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JAMES H. McKENNEY,
Clerk.

No. 248.

Brf. of Dillon, Hubbard & Dillon for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 16, 1901.

No. 248.

ALBERT H. WAITE,

Petitioner,

against

THE CITY OF SANTA CRUZ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 248.

ALBERT H. WAITE,
Petitioner,

AGAINST

THE CITY OF SANTA CRUZ.

Brief for Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE CASE.

This is an action at law brought on negotiable coupons of negotiable bonds, and also upon some of said bonds which had matured, issued by the defendant The City of Santa Cruz, California (Complaint, Record, p. 5).

The bonds and coupons in question in the present case were issued under the refunding statute of California, hereinafter quoted, and were issued under full and regular proceedings of the city council, and vote of the qualified voters of the city, authorizing the same (Findings of Fact No. 5 *et seq.*, Record, p. 19. See Ordinance No. 314, Record, p. 26; Ordinance No. 315; Additional Finding of Fact No. 2, Record,

p. 32, and extracts from Ordinance No. 320, Record, p. 20, Finding of Fact No. 8). The city council sold these bonds to Coffin & Stanton under an agreement to deposit with Coffin & Stanton the proceeds of the sale of the said bonds instead of receiving pay for the said bonds in money (see the said agreement, Finding of Fact No. 10, Record, pp. 22, 23); the city council, however, taking a bond of the American Debenture Company as surety to secure the performance of the contract by Coffin & Stanton, after investigating as to the financial standing of said American Debenture Company and finding it "*was the highest given*" (Record, p. 65). After the delivery of the bonds under such sale the bonds were sold and disposed of by Coffin & Stanton to various *bona fide* purchasers (Finding of Fact No. 12, Record, p. 24). Afterwards the said firm of Coffin & Stanton became insolvent and unable to pay the city of Santa Cruz the proceeds so deposited (see Finding of Fact No. 15, Record, p. 24). If it had not been for their insolvency and their consequent inability to comply with the terms of their agreement, there is no reason to suppose that any question would ever have been made by the city concerning the legality of these refunding bonds. There is no finding of fact, nor is there the slightest evidence in the record to show, or tending in any way to show, that either the city officers of the city of Santa Cruz, on their part, or the said firm of Coffin & Stanton, on its part, acted otherwise than in good faith and with perfect honesty in the entire transaction.

On this point Circuit Judge GILBERT, giving his dissenting opinion in the Circuit Court of Appeals, said (p. 321):

"Through all the transactions culminating in the delivery of the bonds, it is clear that the officers acted in the utmost good faith. There was no fraud, misrepresentation or concealment."

This statement is fully borne out by the record, and none of the judges made any contrary statement.

The case was tried before the Circuit Court without a jury, a stipulation in writing waiving a jury having been duly filed (Record, p. 18).

The court found that the plaintiff was a *bona fide* holder of the said bonds and coupons, he having acquired the same from *bona fide* purchasers thereof, who had paid value without any notice of any illegality or alleged illegality in regard to the same (Record, p. 18, Findings 1 and 2; and p. 24, Finding 12). This statement does not include the three bonds and coupons mentioned in Finding 3 of Findings of Fact by the Circuit Court (Record, p. 18).

The Enabling Act.

The statute under which the said bonds were issued is as follows (Session Laws of California, 1893, p. 59):

"An Act to amend an Act entitled 'An Act to authorize the Common Council, Board of Trustees or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' approved March 15, 1883.

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. That section one of the above-entitled Act is hereby amended to read as follows:

"SECTION 1. That whenever any incorporated city or town, other than cities of the first class, in this State, has *an outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, Board of Trust-

ees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as 'serials,' one-fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed One thousand dollars, nor less than One hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of Treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed six per cent. per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder, for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the Treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one-fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.

"SEC. 2. That section two of said Act be amended so as to read as follows:

"SEC. 2. Whenever sufficient money is in the funding fund in the hands of the Treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds (giving the number thereof), and if the same are not presented for redemption within thirty days after the first pub-

lication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the Post Office, a copy of such notice, enclosed in a sealed envelope, with the postage paid thereon, addressed to the owner or owners of such bond or bonds at the Post Office address of such owner or owners, as shown by the record thereof kept in the Treasurer's office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the Treasurer shall proceed to cancel the same by indorsing on the face thereof the amount for which they are received, the word 'canceled,' and the date of cancellation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city or town, at least once a month, accompanying the same therewith by the bonds which have been taken up and canceled.

"SEC. 3. That section three of said Act be amended so as to read as follows:

"SEC. 3. All moneys which shall remain in said funding fund after all outstanding bonds as were proposed to be refunded have been taken up and canceled, shall be paid into the General Fund of such city or town, and become a part thereof.

"SEC. 4. This Act shall take effect and be in force immediately after its passage."

Approved March 1, 1893.

The said Act of March 15, 1883, was thus entirely superseded by the said Act of March 1, 1893, except Section 4, the only remaining section of the said Act of March 15, 1883, which said Section 4 is as follows (Session Laws of California, 1883, pp. 370, 373), to-wit:

"SEC. 4. Should there remain in said Bond Fund any money after all such bonds shall have been redeemed, the balance so remaining shall be paid into the General Fund of such city (or town), and become a part thereof."

Note that this statute (sec. 1, *supra*) confers upon any incorporated city or town express power to refund "an outstanding indebtedness evidenced by bonds and warrants thereof." Note also that there is nothing peculiar in this enabling statute as to the mode of exercising the express power to refund the obligations of the municipality, or as to any record to be kept by the municipality; and observe also that there is no requirement in the statute that the purchasers shall be bound to take notice of the ordinances or records of the municipality relating to the issue of the refunding bonds, which bonds the statute contemplates shall be long-time negotiable securities, and placed upon the market and sold as such.

In all these respects this case presents only the usual and ordinary case of negotiable municipal bonds, and there is absolutely nothing peculiar in this case *except the decision and judgment of the Circuit Court of Appeals.*

Copy of Bonds and Coupons Involved in Present Action.

The refunding bonds and coupons involved in the present action are in the following form (Complaint, Record, pp. 4–6, and Findings of Court, Record, p. 18, *et seq.*).

" Number.
" ---------- Dollars.
" $1,000.
" United States of America. State of California.
" Bond of the City of Santa Cruz. Refunding Gold Bond.
" Five per cent. Series 1.

" The City of Santa Cruz, a municipal corporation, in the county of Santa Cruz, State of California, is in-

debted to and promises to pay to the bearer, for value received, the sum of one thousand dollars ($1,000), gold coin of the United States, on the fifteenth day of April, A. D. 1895, with interest thereon, in like gold coin, at the rate of five (5) per cent per annum, payable annually on the fifteenth day of April, of each calendar year from the date hereof, at the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

"And for the payment of the principal sum herein named, and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound and its faith and its credit and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity.

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

"And in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and

due form, as required by law. This bond ceases to bear interest when due, unless presented for payment.

"In testimony whereof, the said city of Santa Cruz, by its mayor and common council, has caused this bond to be signed by the mayor of said city of Santa Cruz, and attested by its said clerk, with the seal of said city attached, this sixteenth day of April, A. D. one thousand eight hundred and ninety-four.

[SEAL] WM. T. JETER.

"Mayor of the City of Santa Cruz.

"[Attest];

O. J. LINCOLN,

"City Clerk.

[ENDORSED]:

Number_____

"State of California. The City of Santa Cruz. 1000 dollars. Refunding five per cent Gold Bond.

"$1,000. $1,000.

"Series 1. Interest payable annually April 15. Principal due April 15, 1895.

"(Surcharged on face of bond) $1,000."

"$50. [COUPON]: $50.

"The city of Santa Cruz will pay to bearer hereof, on the fifteenth day of April, 1895, at the office of the city treasurer of said city, fifty dollars, gold coin of the United States, for interest on refunding bond issued sixteenth day of April, A. D. 1894.

"No._____

"WM. T. JETER,

"Mayor of the City of Santa Cruz.

"O. J. LINCOLN,

"City Clerk.

"[Surcharged *of* face of coupon]: 1."

Express Recital in Bond Fatal to the Defense Held Good by the Circuit Court of Appeals.

Note that the bond expressly recites, among other things:

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, **for the purpose of refunding the bonded indebtedness of said city** and issuing bonds therefor, and providing for the payment of the same under and pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled," &c. (reciting the title of the said act of 1893 above quoted).

The City's Defense.

It was alleged as a defense to these bonds (and this was the *only ground* on which the Circuit Court of Appeals held them invalid, see statement to that effect in the Opinion of Circuit Court of Appeals, Record, pp. 309, 315) that out of the $360,000 of old bonded indebtedness authorized to be refunded the sum of $89,000 was not technically bonded indebtedness of the city of Santa Cruz, but was bonded indebtedness of a water company, the plant of which, however, had been purchased by the city *subject to a mortgage securing the said $89,000 of bonds, which bonded indebtedness of $89,000 secured by said mortgage the city had upon its purchase assumed and agreed to pay*, and in its notice of election and in its ordinance calling the election for voting on the refunding bonds, declared "*became thereby a part of the bonded indebtedness of the City of Santa Cruz*" (Additional Findings of Fact, Record, pp. 32, 34 at bottom).

The alleged illegality in the issue of the refunding bonds in question was that they were issued in part to refund bonds of a water company, which water-company bonds the city had assumed upon the purchase of the water plant, agreeing to pay the same; thus, in substance and legal effect, making them the bonds of the city. It is claimed by the city, and the opinion of the Circuit Court of Appeals holds that any purchaser of these refunding bonds is bound to look at the ordinances, notices and proceedings of the city authorizing the issue of these refunding bonds. This we deny.

It is further claimed by the city that, if the ordinance calling the election had been examined by a person intending to purchase the refunding bonds, he would have seen therein the notice of election, and that such notice of election stated th at the refunding bonds were issued in part for the purpose of refunding water-company bonds thus assumed by the city.

We do not admit that the water-company bonds thus assumed by the city were not bonds of the city within the meaning of the statute that authorized the city to issue refunding bonds. But whether they were or not is immaterial so far as a *bona fide* holder of refunding bonds is concerned.

Decision by Circuit Court in Favor of Bondholder.

The Circuit Court held that this defense would be good against a purchaser of these bonds who had notice—a proposition which we dispute (see Point III. of this brief, *infra*, p. 114). The Circuit Court, however, rightly held that this defense could not be made against the *bona fide* holders of the said refunding bonds. The

Circuit Court, DE HAVEN, J., said on this point in its opinion (Record, p. 54) :

"It is next insisted by defendant that Wallace & Co. [the *bona fide* purchasers of the bonds and predecessors in title to the plaintiff Waite] must be deemed to have purchased such bonds with notice that they were issued in part to refund and take up the mortgage bonds of the private corporation, because each bond contained the recital that it was issued 'in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz.'

"The proposition for which the defendant contends upon this point is, that by this general reference to the ordinances of the city, all purchasers were put upon inquiry as to the terms of the ordinances under which the bonds were issued; and that as it appears from these ordinances that a part of the refunding issue was to be used in refunding the mortgage bonds of the private corporation, all persons purchasing the bonds are to be charged with notice of this fact. I do not think this contention can be sustained, although it is apparently supported by the case of *Post v. Pulaski County*, 49 Fed., 629, cited by the counsel for defendant.*

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* The case cited, *Post v. Pulaski County*, has been expressly overruled by the very court which originally decided it, namely, the United States Circuit Court of Appeals for the Seventh Circuit. That court said in *Wesson v. County of Saline*, 73 Fed. Rep. 917, 919 (Mr. Justice HARLAN sitting at the hearing, but not participating in the decision) :

"But the proposition enunciated in *Post v. Pulaski County*, that 'the recital in the bonds that they were issued pursuant to an order of the county court put whosoever should come into possession of these bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order,' is inconsistent with, and must be regarded as overruled by the recent ruling of the Supreme Court in the case of *City of Evansville v. Dennett*, *supra*, where it was held that a recital that a subscription to the stock of a railroad company was 'made in pursuance of an act of the legislature and ordinances of the city counsel, passed in pursuance thereof, * * * imported not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute."

The recital above quoted does not stand alone. In addition to and immediately preceding it, **the bonds under consideration expressly state that they were 'issued for the purpose of refunding the bonded indebtedness' of the city of Santa Cruz, and in conformity with the act of the legislature which they recite.** The further statement, that their issuance was also in conformity with the ordinances of the city of Santa Cruz, does not detract from or modify the effect of the prior recital concerning the purpose for which the bonds were issued, and certainly cannot be construed as a warning to purchasers to examine the ordinances and determine for themselves and at their peril whether the previous representation in relation to the purpose for which the bonds were issued was true or false. On the contrary, this general reference to the ordinances of the city of Santa Cruz must be read in connection with the other parts of the instrument in which it is found, and when this is done and all the recitals are given effect, it is at once seen that they import not only that the bonds were issued in conformity with the act of the legislature, 'but that the ordinances of the city council were in conformity with the statute.'

"*Evansville v. Dennett*, 161 U. S., 434. See, also, *Hackett v. Ottawa*, 99 U. S., 86; and the well considered case of *Risley v. Village of Howell*, 64 Fed., 453."

The Circuit Court accordingly rendered judgment in favor of the plaintiff (Record, p. 41).

Decision and Judgment in Circuit Court of Appeals.

The City of Santa Cruz took a writ of error to the Circuit Court of Appeals for the Ninth Circuit (Record, pp. 259, 303-308), and that court by a vote of two Judges against one dissenting Judge held that, notwithstanding these recitals in the bonds, a *bona fide* purchaser of the same was put upon notice of the ordinances and records of pro-

ceedings of the city council of the city of Santa Cruz, *and on this ground alone* held that the bonds were invalid, and reversed the decision of the Circuit Court, with direction to enter judgment for the defendant on the findings (Opinion of Court by Ross, C. J., Record, p. 309; and Dissenting Opinion by GILBERT, C. J., Record, p. 316; and Judgment, Record, p. 321).

The Court held not merely $89,000 of the refunding bonds invalid, but the whole $360,000 invalid on account of the supposed defect that $89,000 old bonds refunded were technically not bonds of the city, although even these $89,000 old bonds were really indebtedness of the city and bonded indebtedness. This is monstrous injustice (see this Brief, POINT III. *infra*).

The decision of the Circuit Court was given by District Judge DE HAVEN (Record, p. 42), and the decision of the Circuit Court of Appeals was given by Circuit Judge Ross (Record, p. 309), and concurred in by District Judge HAWLEY, but Circuit Judge GILBERT dissented (Record, p. 316).

The plaintiff filed a petition in the United States Circuit Court of Appeals for rehearing in that Court, which petition was denied (Record, p. 322).

Certiorari Granted by this Court.

Thereupon plaintiff filed a petition in the Supreme Court of the United States for a writ of *certiorari* to bring this case to this court, under Section 6 of the act of Congress of March 3, 1891 (26 U. S. Stat., 826); and such petition was granted (177 U. S., 695), and such writ of *certiorari* was accordingly issued

(Record, p. 323), and the record and proceedings in this cause have been returned to this court pursuant to the said writ (Record, pp, 323–325):

As the case now stands, therefore, two of the Judges, a Circuit Judge, and a District Judge, have given opinions one way on the question involved, and two other Judges, a Circuit Judge and a District Judge, have given precisely opposite opinions in the same circuit.

Circuit Judge Ross in his opinion in the Circuit Court of Appeals says (Record, p. 314 *et seq.*):

"The statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness proposed to be refunded, together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued."

The learned Judge is demonstrably mistaken in supposing that the statute required to be entered upon the record or minute book of the city council the specific indebtedness proposed to be refunded. A reading of the statute above quoted shows that this is not the fact. The statute only requires that "the *notice of election* shall recite the indebtedness to be refunded" (Sec. 1), and the statute nowhere requires that such notice of election be spread upon the records of the city, and nowhere requires that the ordinance shall describe or recite the indebtedness to be refunded. The learned Judge was mistaken, therefore, in supposing that even if a *bona fide* purchaser were put upon no-

tice of such records he would have had constructive notice of the specified indebtedness proposed to be refunded. Of course, in any case of constructive notice, a person has constructive notice of only what is required by law to be put on a record (See cases on this brief, *infra*, pp. 86–89.)

But, even if the specific indebtedness to be refunded was required by the statute to be entered upon the record or minute book of the city council, still a bona fide purchaser of these negotiable bonds with such recitals as these bonds contain would not have been put upon notice of what such indebtedness was contracted for, much less that there was any illegality in such indebtedness. See the cases of *Evansville vs. Dennett*, 161 U. S., 464; *Hackett vs. Ottawa*, 99 U. S., 86, and *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255, in all of which the opinions were delivered by Mr. Justice HARLAN, and other cases cited on this brief under Point I., *infra*, pp. 51–72.

In the case of *Evansville vs. Dennett*, 161 U. S., 434, where the charter of the city of Evansville expressly required all the ordinances and resolutions to be entered on the records of the city, and in the case of *Graves vs. Saline County*, 161 U. S., 359, where the county refunding bond act expressly required the officer to enter upon his record "the description of the bond or evidence of indebtedness for which, or for the purchasing or retiring of which the same was given" (Session Laws of Illinois, 1879, p. 231), **this Court expressly holds that a bona fide holder of bonds with recitals such as the present bonds contain need not examine such**

ordinances, resolutions or proceedings of the municipality.

The negotiability of municipal bonds and the conclusiveness of recitals therein in favor of a *bona fide* holder do not depend upon the question whether or not the charter of the municipality or the laws governing the same expressly require that certain records of the municipality be kept. It is the universal practice of municipalities to keep records, and everybody knows this, and courts take cognizance of the fact. Not only so, but in every instance, or in almost every instance, these records are kept under express requirements of the statute, and have been so wherever municipalities have been established. All these facts as to keeping records and as to the requirements of keeping records have been present in every one of the cases where municipal bonds have been held good in the hands of *bona fide* holders, notwithstanding what appeared in the ordinances, resolutions and other records of the municipalities issuing them. It is also safe to say that in every instance, or in almost every instance, a full and careful examination of these records might have disclosed the various illegalities complained of in the defenses set up against the various issues of bonds which have been held valid in the hands of *bona fide* holders. What the Supreme Court of the United States has repeatedly said is that the holder of negotiable municipal bonds with recitals need not examine such records of ordinances, resolutions and other proceedings. Any view which would narrow the negotiability of municipal bonds so as to make it obligatory upon any and every holder to examine the ordinances, resolutions and other proceedings of the municipality misconceives the very purpose of having such munici-

pal bonds negotiable, which is that the holder of the bonds be not obliged to go there and examine all of the ordinances, resolutions and records of the municipality. To this effect are all the decisions of the Supreme Court of the United States.

STATEMENT OF QUESTIONS PRESENTED BY THE RECORD AND BILL OF EXCEPTIONS IN THE PRESENT CASE.

No error in the Circuit Court's overruling the defendant's demurrer to the amended complaint.

The defendant filed its demurrer to the amended complaint in this action (Record, pp. 7, 8). The *first* ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. Obviously a demurrer on this ground cannot be sustained, as a mere glance at the amended complaint (Record, p. 3), and the statute under which the bonds were issued (this Brief, *supra*, p. 3), will readily show.

The *second* ground of demurrer is that the act under which the bonds were issued was in conflict with the constitution of California and the constitution of the United States. The Supreme Court of California has expressly held with regard to this very act that it does not conflict with the constitution of California *(Los Angeles vs. Teed*, 112 Cal., 319.*)* Obviously the act does not conflict with the constitution of the United States (See this Brief, p. 157).

The *third* ground of demurrer assigned is that the complaint is uncertain in this: *(a)* that while the com-

plaint alleges that all acts, conditions and things required to be done, &c., in the issuance of the bonds, have been done, it does not appear therefrom what, if any, acts, conditions and things were done, &c.; and *(b)* that it does not appear from the complaint whether or not the bonds therein mentioned were sold for not less than their face value in gold coin as required by law. Obviously this ground of demurrer is not well taken. In declaring on a negotiable bond, or a coupon, it is sufficient to set forth the fact that the defendant made, executed and delivered the bond, or coupon, either setting forth the substance of the bond, or coupon, or a copy thereof. It is not necessary for the plaintiff to allege and prove the performance by the municipality of all the conditions precedent to the issuance of the bonds. Negotiable instruments are in the nature of specialties, and it is necessary only to allege and prove the *factum* of such instruments.

If there was any defect in any of the proceedings, this was a matter of defense to be pleaded and proved by the defendant, and not a matter which the plaintiff was required to plead or prove. The foregoing principles are so well established, and so familiar to this Court, that we need not waste any time in citing the numerous authorities which sustain them.

DEMURRER OVERRULED.—The Circuit Court overruled this demurrer. Mr. Justice MCKENNA, then Circuit Judge, rendered the decision (Record, p. 8; See opinion of Circuit Judge MCKENNA, 75 Fed. Rep., 967.)

ANSWER.—Thereupon the defendant made and filed its answer (Record, p. 9 *et seq.*).

FILING ANSWER WAIVED ANY FORMAL DEFECTS IN COMPLAINT, IF ANY SUCH EXISTED, WHICH WE DENY.—As a matter of fact, there are no defects in the plaintiff's

complaint, but even if there were, it is well settled that the defendant, by answering when his demurrer to the complaint was overruled, instead of suffering judgment to be entered and then taking a writ of error to reverse the ruling on the demurrer, waived any formal defects, if any there were, in the complaint, which might have been taken advantage of by demurrer, if the defendant had persisted in his demurrer instead of pleading over. After such answer and trial upon the issues, and after findings of fact and judgment entered, it is too late for the defendant to raise any question of any formal defects in the complaint, if any such existed, and none such did exist. It is not necessary to cite to this Court the numerous authorities in support of the foregoing propositions.

Findings of Fact.

As above stated, this case was tried by the Circuit Court without a jury, a stipulation in writing waiving a jury having been duly filed (Record, p. 18, and pp. 41, 60). The Court, on September 29, 1898, made and filed special findings of fact and conclusions of law (Record, pp. 18-25), and on the same date, September 29, 1898, entered judgment on such findings in favor of the plaintiff (Record, p. 41).

Not Reviewable Error to Deny Motion for New Trial.

Afterwards the defendant made a motion for a new trial (Record, p. 252), which motion was denied (Record, pp. 253, 25). It is, of course, well-settled law that no error can be predicated in the United States

Courts of the refusal of the trial Court to grant a motion for a new trial, nor in respect of any of the matters urged upon the Court upon such motion for a new trial. On this point see *Ayers vs. Watson*, 137 U. S., 584, which was an action at law, tried before a jury; in which verdict was for plaintiff, and motion was made for a new trial. This Court says (p. 597):

"We have only to repeat what we so often endeavored to impress upon counsel, that error does not lie for granting or refusing a new trial."

See, also, to the same effect:

Missouri Pacific Railway Company vs. Chicago & Alton Railroad Company, 132 U. S., 191, in which case there was a trial by Court without a jury.

Fishburn vs. Chicago, Milwaukee & St. Paul Railway Company, 137 U. S., 60.

Fitzgerald & Mallory Construction Company vs. Fitzgerald, 137 U. S., 98.

No error, therefore, can be predicated in this Court of the trial Court's refusal to grant the motion for a new trial, or for any of the matters that were brought to the attention of the trial Court, or its action thereon, upon such motion for a new trial. As to such motion for a new trial, and as to all of the matters urged upon the Court upon such motion for a new trial, the defendant had already had its day in court, and an opportunity to be heard upon the original trial—in other words, it is not error for the court to refuse to grant a motion for a new trial. It may grant one as a matter of discretion and of grace, but it is not a matter to which a party can claim a right.

Additional Findings of Fact.

While the said motion for a new trial was pending, defendant moved the court (Record, p. 253 *et seq.*) to make certain additional findings, and excepted to certain additional findings which the court did make Record, p. 254 *et seq.*). The additional findings of fact made by the court are set forth in the Record (pp. 25–41). These were made and "filed December 1, 1898, *nunc pro tunc*, as of September 29, 1898" (Record, p. 41).

It is well settled that in an action at law tried by a United States Circuit Court without a jury, where a jury trial has been waived by the parties by a writing duly filed under the United States statute, neither the findings of fact by the court, nor its refusals to find facts requested by either of the parties, constitute any error, and the question whether the court correctly found the facts or correctly refused to find other facts cannot be reviewed on writ of error in this court.

This court cannot look into the evidence to see whether or not such findings of fact were correct or were supported by the evidence, or whether the evidence would have justified the court in making other findings of fact requested by either of the parties.

It follows, therefore, that, so far as this record and bill of exceptions contain any exceptions to the court's findings of fact or refusals to find facts, these are not matters which can be considered here upon this writ of error. The only questions presented upon this writ of

error, therefore, are whether the facts found by the Circuit Court are sufficient to sustain the judgment in favor of the plaintiff, and whether the trial court made any erroneous ruling upon the admission or rejection of evidence. No question can be raised as to whether the evidence supports the findings of fact, and this court cannot, and will not, look into the evidence to see whether it sustains the findings of fact.

The same rules and principles of law apply in the United States Circuit Courts of Appeals on writs of error to the United States Circuit Courts. The language of the act of March 3, 1891 (26 U. S. Stat., 826), establishing the United States Circuit Courts of Appeals, is that such courts (Section 6) "shall exercise appellate jurisdiction to review by appeal or writ of error," etc., and by the very nature of a writ of error at common law, and under the constitution of the United States and the acts of Congress below cited, the same rule applies to review on writ of error in the Circuit Courts of Appeals as to review on writ of error in the Supreme Court of the United States.

Hill vs. Woodberry, 4 U. S. App., 68.
Mirchen vs. Hart, 36 U. S. App., 958, and
Syracuse vs. Rollins, 104 Fed. Rep., 958 (Oct., 1900).

Furthermore, this case is here on *certiorari* issued by this court to the United States Circuit Court of Appeals, under Section 6 of said act of Congress of March 3, 1891 (26 U. S. Stat., 826), which provides:

"It shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, *with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.*"

The Only Questions in the Case.

In the present case, therefore, on this writ of *certiorari*, the only questions which are open on the record in this case are whether the facts as found by the Circuit Court are sufficient in law to sustain the judgment rendered in favor of the plaintiff, and whether there were any erroneous rulings on the admission or rejection of evidence during the progress of the trial, to which any objections were made and exceptions taken by the defendant.

Section 700, Rev. St., provides:

"SEC. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Note the language of Section 649—"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury"—that is, a special finding of the court upon the facts is conclusive, and, as is stated by this court in the case of *Stanley vs. Supervisors of Albany*, 121 U. S., 535, 547, "Where a case is tried by the court without a jury, its findings upon the questions of fact are conclusive here;" and no error can be assigned here as to the court's finding, or refusing to find, certain facts. "Such rulings are not open to review here; they can be considered only by the court below."

The language of Section 700 is, "when the finding is

special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." Thus, the question that arises where the finding is special is: Do the facts as found by the trial court support the judgment? And no question arises as to the weight of evidence or the sufficiency of evidence to sustain the findings of fact.

In *Norris vs. Jackson*, 9 Wallace, 125, Mr. Justice MILLER, giving the opinion of the court, in speaking of the act of Congress of March 3, 1865, now contained in Sections 649 and 700 of the Revised Statutes, says (p. 127):

"This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest.

"The next thing to be observed is, that whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found."

Certain of the City's Assignments of Error Relate to Matters Not Reviewable by this Court.

It follows, therefore, that many of the numerous and lengthy assignments of error contained in the record in the United States Circuit Court of Appeals, and printed in the present record (pp. 259-302, inclusive), are not open to consideration. Thus, the assignments of error numbered 23 to 46, inclusive (Record, pp. 269-

289, inclusive), which are assignments of error for the court's finding certain facts or refusing to find certain other facts, as well as the exceptions of the defendant to the court's finding certain facts or refusing to find certain other facts, are not any of them open to consideration in this court.

The foregoing principles of law are well settled by numerous decisions of this court.

Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive, and no error can be predicated of the action of the court in finding particular facts, nor upon its refusal to find other facts requested by either of the parties.

In *Stanley vs. Supervisors of Albany*, 121 U. S., 535, an action at law was tried by a United States Circuit Court without a jury, jury trial having been waived by the parties. On writ of error the Supreme Court of the United States said (p. 547):

"Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it, to its finding of particular facts and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. Thus, the principal finding of the court is: 'That the plaintiff has failed to establish the allegations in said complaint; that the several assessments herein referred to were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of this state.' And the first assignment of error is that the court erred in deciding that the plaintiff failed to establish the allega-

tions mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition, which is nothing more than that the court below found against the evidence, a question not open to review or consideration in this court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment (Act of March 3, 1865, 13 Stat., c. 86, § 4; Rev. Stat., § 700).

"The same answer will apply to the exceptions taken to the refusal of the court to make certain additional findings. If error was thus committed, it was in not giving sufficient weight to the evidence offered, a matter determinable only in the court below."

It is well settled that upon writ of error the Supreme Court of the United States cannot reverse any decision for any error of fact, but that the facts found by verdict of the jury, whether the same be general or special, also the facts found by the court without a jury, whether such findings be general or special, and whether or not a stipulation in writing has been filed waiving a trial by jury, are conclusive, and the sufficiency of the evidence to support the facts found cannot be inquired into on writ of error.

The seventh amendment to the constitution of the United States provides

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

It is elementary learning that at the common law questions of fact were for the jury, and only questions of law for the court, and that upon a writ of error only

questions of law can be examined in the higher court, and not questions of fact, whether those facts are found in a general verdict or in a special verdict.

In *Campbell vs. Boyreau*, 21 Howard, 223, Mr. Chief Justice TANEY says (p. 226) :

"By the established and familiar rules and principles which govern common law proceedings, no question of the law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings or judgment in the cause), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts and referring the questions of law to the court.

"The finding of issues in fact by the court upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury."

The Revised Statutes expressly provide (Section 1011)

"There shall be no reversal in the Supreme Court, or in a Circuit Court, upon a writ of error * * * for any error in fact."

Section 648 of the Revised Statutes provides

"The trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy and by the next section."

Section 649 provides

"Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in

writing waiving a jury. The finding of the court upon the facts, which may be either general or *special, shall have the same effect as the verdict of a jury.*"

In *Miller vs. Life Insurance Company*, 12 Wallace, 285, in which the case was tried by a Circuit Court of the United States "without the intervention of a jury," trial by jury having been waived by the parties (p. 291), the Court found the facts as prayed for by the plaintiff (pp. 291, 292) and entered judgment accordingly, and refused to find the facts as prayed for by the defendant (pp. 292, 293). On writ of error to the Supreme Court of the United States that Court said, Mr. Justice CLIFFORD giving the opinion (p. 299):

"Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party, but the issues of fact were tried and determined by the Circuit Court, and the act of Congress provides that the finding of the Circuit Court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law (2 Story on the Constitution, § 1770). Facts so tried could only be re-examined, under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings (*Parsons v. Bedford*, 2 Peters, 448; 2 Story on the Constitution, § 1770). Matters of fact found by the Circuit Court under such a submission cannot be re-examined here, as by the express language of the act the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment.

Tested by these rules, which are believed to be undeniable, it is clear that no one of the said several requests presented by the defendants shows any ground for reversing the judgment, as every one of them assumes as facts matters dependent upon the evidence, and which are not embraced in the findings of the Circuit Court. All matters of fact must be found by the Circuit Court, and not by the Supreme Court, as the act of Congress provides that the issues of fact may be tried and determined by the Circuit Court where the suit is brought. Rejected by the Circuit Court, as the several requests under consideration were, it is too plain for argument that no one of the propositions of fact therein contained is found to be true by the Circuit Court. On the contrary, the complaint of the defendants is that the Circuit Court improperly found a different state of facts, and gave judgment for the plaintiff. They contend that the Circuit Court ought to have found the facts to be as assumed by them in their requests, and what they seek to accomplish by the writ of error is to show that the finding of the Circuit Court is erroneous, and to induce this court to set aside that finding, affirm the propositions of fact assumed in their requests, reverse the judgment of the Circuit Court, and grant a new trial or render judgment in their favor. Enough has already been remarked to show that nothing of the kind can be done, as the act of Congress requires that the facts must be found by the Circuit Court. *Norris* v. *Jackson*, 9 Wallace, 127. Inferences of fact must be drawn by the Circuit Court, which, by the agreement of the parties, is substituted for a jury, and cannot be drawn by this court, which sits as a court of errors. *Tancred* v. *Christy*, 12 Meeson & Welsby, 323. Conclusions of fact cannot be found by this court when sitting as a court of errors under the act of Congress authorizing the Circuit Courts to try and determine issues of fact in civil cases, as in the case before the court. What is required is that the findings of the Circuit Court shall contain the conclusions of fact, or, as the rule is stated in a recent decision of this court, a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest, and it is well-settled law that the finding must be sufficient in itself without inferences or comparisons, or balancing of testimony or weighing evidence (*Burr* v. *Des Moines Co.*, 1 Wallace, 102)."

In *Tyng vs. Grinnell, Collector*, 92 U. S., 467, an action at law was tried by a Circuit Court without a jury, a stipulation having been filed waiving a trial by jury, and the court made special findings. Mr. Justice CLIFFORD, giving the opinion of this court, said (p. 471):

"Special findings under such a submission are no more subject to review here than general findings, as the provision in respect to both is that the finding of the court shall have the same effect as the verdict of a jury. Appellate courts have no more power to review the verdict of a jury where it is special than if it be general; but they may inquire and determine whether the special verdict is the proper basis of a judgment; and the act of Congress provides that the review, if the finding is special, may extend to the determination of the sufficiency of the facts found to support the judgment.

Matters of fact in such cases are not reviewable here under any circumstances, as appears by all the cases decided by this court, since the act was passed allowing parties to waive a jury, and to submit the law and fact to the determination of the Circuit Court. Consequently, it is irregular to report the evidence in the transcript, except so far as it may be necessary to explain the legal questions reserved, as to the rulings of the court in the progress of the trial; nor is either party entitled to a bill of exceptions as to any special finding of the court, for the plain reason that the special findings of the Circuit Court in such a case are not the proper subject of exceptions nor of review in this court."

In the case of *Ryan vs. Carter*, 93 U. S., 78, an action at law was tried by a Circuit Court without a jury, a stipulation waiving a trial by jury having been filed. The Supreme Court of the United States, on writ of error, said (p. 81):

"The court below, by stipulation, tried the case, and made a special finding of facts, on which it based its conclusion of law, that the plaintiffs could not recover. It is objected that some of these facts were not warranted by the evidence; but this is not a subject of inquiry here. If the parties chose to adopt this mode of trial, they are concluded by the propositions of fact which the evidence, in the opinion of that court, establishes. Whether general or special, the finding has the same effect as the verdict of a jury: and its sufficiency to sustain the judgment is the only matter for review in this court, (*Norris v. Jackson*, 9 Wall., 125; *Flanders v. Tweed*, *id.*, 425; *Kearney v. Case*, 12 *id.*, 275; *Miller v. Life Ins. Co.*, *id.*, 285)."

It makes no difference in the rule above stated that in the present case the parties stipulated (Record, p. 60):

"that certain facts may be, and are hereby, taken, for the purposes of this action, to be true, and shall be regarded as proven, subject to all objections as to their immateriality, without the introduction of any evidence thereon by either party;"

and also stipulated (Record, p. 91):

"that the witnesses testifying in such depositions testified respectively to the following effect."

Only such facts can be considered as are expressly found by the Court. See on this point *Tyre & Spring Works Company vs. Spalding*, 116 U. S., 541, 545, 546. As stated in the cases above cited, the court finds the ultimate facts and does not find the evidence, and the question is whether the ultimate facts as found by the Court sustain the judgment. No question can be raised whether the evidence supports the findings of fact by the Court, and it makes no difference that it was stipulated by the parties in the present case that the witnesses testified so and so.

In *Lehnen vs. Dickson*, 148 U. S., 71, Mr. Justice BREWER, giving the opinion of the Court, said, with regard to the rule that in cases where a jury is waived the evidence cannot he considered, and only such facts can be considered as are expressly found by the Court, as follows (p. 77):

"But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another, because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

The questions which are open to consideration, then, by this Court, are whether the findings of fact made by the trial Court are sufficient in law to support the judgment, and whether there were any errors committed by the trial Court in its rulings upon the admission or rejection of evidence.

Findings of Fact.

The said Findings of Fact and Conclusions of Law, including also said Additional Findings of Fact are

printed in the Record, pages 18–25 and 25–41, to which reference is hereby made.

Exceptions to Admission or Rejection of Evidence.

During the progress of the trial defendant made objections and took exceptions to the admission of certain evidence, and also to the refusal of the court to admit certain evidence. Some of these exceptions had to do with the admission of evidence showing that certain persons were *de facto* officers of the city of Santa Cruz (Record, pp. 147–150, inclusive, also p. 226). So far as these exceptions to this particular evidence are concerned, the admissiblity of such evidence is connected with and involved in the findings of fact by the court; particularly, findings numbered 9, 10 and 11, and the conclusion of law numbered 1 (Record, pp. 22–25). The question of law involved in such exceptions, and the sufficiency of such findings to support the judgment, are considered by us in the argument in this brief (*infra*, pp. 186–214).

Certain other exceptions relate to the refusal of the court (Record, pp. 251, 252), to permit William H. Flemlng to give certain testimony concerning an entry that he states that he found on the books of F. H. Prince & Company. Mr. Fleming stated, among other things, "I don't remember any particular part that I took in such transaction; I may have, but I don't remember." The testimony which the defendant asked him to give was plainly incompetent and immaterial, as was held by the Circuit Court.

The only substantial question, therefore, in the present case is whether the findings of fact made by the Circuit Court are sufficient in law to sustain the judgment of the Circuit Court in favor of the plaintiff. We proceed to the argument of the legal propositions involved in that question.

ARGUMENT.

I.

The recital in the bonds in question that they are "issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city" estops the city from showing, or attempting to show, that the bonds, or any part of them, were issued for a purpose other than that "of refunding the bonded indebtedness of said city;" and such recital is conclusive on this fact in favor of the bona fide holders of said bonds.

The only ground on which the Circuit Court of Appeals based its decision in favor of the defendant the City of Santa Cruz was that out of the $360,000 old indebtedness refunded by this issue of bonds $89,000 was not bonded indebtedness of the city (which proposition we dispute, *post*, p. 114), and that such fact as to $89,000 old indebtedness had the legal effect to invalidate the entire issue of $360,000 refunding bonds, even in the hands of *bona fide* holders. The

$89,000 old indebtedness in question was represented by bonds of the water company secured by mortgage, which bonds and mortgage the city had assumed and agreed to pay as part of the purchase money in the deed whereby it acquired the title to its water-works system. The Circuit Court of Appeals also held that every purchaser of the refunding bonds was bound to examine and to take notice of the contents of the ordinances which authorized the issue of the refunding bonds, notwithstanding the recitals in the bonds, and that, if the purchaser had made such examination, he would have seen that the said $89,000 old indebtedness was not bonded indebtedness of the city, and could not be refunded under the refunding act.

We proceed to show in this point (Point I.) that, even if the city were right in its contention as to the non-fundability of said $89,000 old bonds, which we deny, it is estopped by the recitals in the bonds in suit as against a *bona fide* purchaser from making such defense.

THE PLAINTIFF IS THE *BONA FIDE* HOLDER OF THE BONDS AND COUPONS SUED ON, AND ENTITLED TO MAINTAIN THIS ACTION UPON THEM.*

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* The following banks, trust companies, firms and individuals were, as shown by the evidence in the record, the *bona fide* purchasers of the refunding bonds involved in the present case, having paid full value therefor, or loaned money in the usual course of business on the pledge of the said bonds as collateral security :

John Branch, St. Albans, Vt., 1 bond, No. 297 (Record, p. 91)	$1,000
International Trust Company, Boston, Mass., 16 bonds, Nos. 10, 11, 12, 14, 91, 92, 93, 118-126, inclusive (Record, p. 92)	16,000
Chapman National Bank, Portland, Me., 7 bonds, Nos. 245-251, inclusive (Record, p. 94)	7,000

A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser (*McClure vs. Oxford Township*, 94 U. S., 429). These bonds and the coupons are payable to bearer and transferable by delivery, and may be sued upon by the bearer. As the previous holders of the bonds in suit were *bona fide* holders for valu e (Findings of Court No. 12, Record, p. 24; amended, Record, pp. 39–41), the plaintiff can avail himself of such previous holders' position without showing that he himself has paid value (*Montclair vs. Ramsdell*, 107 U. S., 147).

The court found as follows (Record, p. 18):

"1. That all of the bonds and coupons referred to in the amended complaint were, prior to the commencement of this action, duly assigned to the plaintiff, and that the plaintiff was, at the date of the commencement of this action, the holder of the legal title to all said bonds and coupons.

Wakefield Trust Company, Wakefield, R. I., 1 bond, No. 21 (Record, p. 95)	1,000
National Bank of the Republic, Boston, Mass., 10 bonds, Nos. 72, 109–117, inclusive (Record, p. 98)	10,000
E. G. & E. Wallace, Rochester, N. H., 150 bonds, including, among others, Nos. 1–8 (Record, pp. 99, 100)	150,000
First National Bank, Worcester, Mass., 22 bonds, Nos. 9, 13, 23, 100, 300–303, inclusive; 308–312 inclusive; 325–327, inclusive; 328, 343, 348–351, inclusive (Record, p. 102)	22,000
First National Bank, Hagerstown, Md., 6 bonds, Nos. 83–87, inclusive, and No. 299 (Record, pp. 104, 109)	6,000
Albany City National Bank, Albany, N. Y., 20 bonds, Nos. 233, 235–244, inclusive, and 280–288, inclusive (Record, p. 106)	20,000
South Norwalk Savings Bank, South Norwalk, Conn., 11 bonds, Nos. 25, 26, 95, 97, 98, 99, 154, 155, 158, 305, 306 (Record, p. 109)	11,000
Bank of Skaneateles, Skaneateles, N. Y., 5 bonds, Nos. 102–106, inclusive (Record, p. 110)	5,000
Farmers' National Bank, Mount Holly, N. J., 4 bonds, Nos. 96, 156, 276 and 313 (Record, p. 113)	4,000

2. That the plaintiff did not pay any money consideration for the assignment to him of any of said bonds or coupons, but all of said bonds or coupons were assigned to plaintiff for collection only."

It is no objection to the maintenance of this action that the plaintiff did not pay any money consideration for the assignment to him of any of the said bonds or coupons, but all said bonds and coupons were assigned to plaintiff for collection only, for all the holders of these bonds were non-residents and not citizens of the State of California. On this point see the case of *Bernards Township vs. Stebbins*, 109 U. S., 341, in which case certain citizens of New Jersey, New York and Pennsylvania had delivered bonds and coupons to the plaintiff (p. 347) "*solely for the purpose of bringing suit*" on the same. This court held that so far as respects the coupons or bonds owned by the citizens

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Kenduskeag National Bank, Bangor, Me., 12 bonds, Nos. 136-138, inclusive, 145, 147-153, inclusive (Record, p. 114) 12,000

National Bank of Waterville, Waterville, N. Y., 1 bond, No. 360 (Record, p. 117) 1,000

First National Bank, Webster, Mass., 4 bonds, Nos. 22, 277, 78, 79 (Record, p. 120)..... 4,000

Martin's Bank, Limited, London, England, 8 bonds, Nos. 184, 185, 186, 201-205, inclusive (Record, pp. 123, 126) 8,000

Northern Counties Investment Trust Company, Limited, England, 3 bonds, Nos. 181, 182, 183. The said company paid for these bonds by surrendering and exchanging therefor 3 bonds of $1,000 each of the City Water Company of Santa Cruz (Record, p. 128)..... 3,000

The findings of fact by the Court do not show (nor did the evidence, except in two or three instances, show) whether or not said *bona fide* purchasers made direct assignments to plaintiff Waite of the nine bonds sued on, numbers 1-9, inclusive, due April 15, 1895, or of the coupons sued on, or whether there were or were not mesne assignments, before the legal title came to the plaintiff Waite. There may or may not have been such mesne assignments. Such fact, however, is immaterial.

of such States other than the State of New Jersey the suit could be maintained in the Federal court, but could not be maintained as respects the bonds or coupons owned by the citizens of the State of New Jersey, of which State the defendant was a citizen. The court on this point said (p. 356) :

" But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the circuit court " (citing numerous cases).

Accordingly, in the present case, both the Circuit Court and also the Circuit Court of Appeals held that the Federal court had jurisdiction.

Of course, if the Federal court had not jurisdiction of the case, then the proper judgment of the Circuit Court of Appeals would not have been to reverse the cause with direction to enter judgment for the defendant, as was done in the present case (Record, p. 316), but to reverse the cause with direction to dismiss the action, so that any judgment would not be an estoppel. And in this view the judgment of the Circuit Court of Appeals would be clearly erroneous and should be reversed.

There was clear statute authority for the issuance of these refunding bonds. Section 1 of the act of March 1, 1893 (Session Laws of California, 1893, p. 59), provides for the refunding by cities of " outstanding indebtedness evidenced by bonds and warrants thereof." (See this enabling act quoted in full in this brief, pp. 3-5).

These bonds recite (see Form of Bond, Complaint, Record, pp. 4–6, and Finding of Court, No. 1, Record, p. 18 *et seq.*), as follows :

" This bond is one of a series of bonds of like date, tenor and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act of the Legislature of the State of California entitled," &c. (reciting the title of the said act approved March 1, 1893).

Legal effect of such a recital in the bonds. The error of the Circuit Court of Appeals.

It is well settled that such a recital as this estops the city from showing, or attempting to show, that the bonds were not issued " *in pursuance of and in conformity with* " the statute, and from showing, or attempting to show, that the bonds were not issued " *for the purpose of refunding the bonded indebtedness of said city.*"

The Circuit Court of Appeals, in its opinion (Record, pp. 314, 315), held that notwithstanding these recitals in the bonds, it was the duty of a *bona fide* purchaser of these bonds to examine the minutes of proceedings of the city council authorizing the issue of these bonds, and also to examine the notice of election, and that if the *bona fide* purchaser had examined these, he would have found that out of the $360,000 old bonds to be refunded, $89,000 were technically not bonds of the city, but were bonds of a water company, the plant and property of which had been purchased by the city, subject to and the city assuming the payment of these

$89,000 bonds, so that these $89,000 of bonds were really indebtedness of the city, and were indebtedness represented by bonds. The Circuit Court of Appeals, therefore, held the entire issue of refunding bonds illegal, even in the hands of a *bona fide* holder.

It is well settled, under numerous decisions of the Supreme Court of the United States, that the *bona fide* holder of municipal bonds containing recitals such as the recital above quoted, which appears in the bonds now in question, is not bound to examine the ordinances and minutes of proceedings of the city council, or notices of election, in order to see whether or not the old indebtedness refunded by the bonds was bonded indebtedness of the city or not. The recital of the fact in the bond is conclusive in favor of the *bona fide* holder.

Evansville vs. Dennett Controlling in Present Case.

The precise question involved in the present case has been decided by this Court in *Evansville vs. Dennett*, 161 U. S., 434, directly contrary to the opinion of the two Judges of the Circuit Court of Appeals, Ross and HAWLEY, in the present case. Mr. Justice HARLAN, giving in the case last cited the unanimous decision of this court, answered all the following questions in favor of the *bona fide* holder, to wit (pp. 439-440, 446):

"1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson and Nashville Railroad Company, that they were issued in 'pursuance of an Act of the Legislature of the State of Indiana and ordinances of the City Council of said city, passed in pursuance thereof,' put a purchaser

upon inquiry as to the terms of the ordinances under which the bonds were issued? [No].

"2. Does the recital in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, that they were issued 'by virtue of a resolution of said City Council passed May 23, 1870,' put a purchaser upon inquiry as to the terms of that resolution, and charge him with knowledge of its terms? [No].

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, **estop the City of Evansville from asserting that such bonds were not issued, for stock subscribed,** upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed? [Yes].

"4. Under the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company was a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of Evansville, freeholders of that city, had been presented to the Common Council, before that body had subscribed for stock in the said railroad company? [No].

"5. Was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it [No], or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds?" [Yes].

The recital in one issue of the bonds in the case of *Evansville vs. Dennett* was that they were issued "*in pursuance of an act* of the legislature of the State of Indiana *and ordinances* of the city council of such city, passed in pursuance thereof;" and in the other issue of said bonds, "*by virtue of an act* of the general assembly of the State of Indiana entitled * * * and *by virtue of the resolution* of said city council of said

city, passed October 4, 1869; * * * and *by virtue of a resolution* of said city council, passed May 23, 1870,' &c. The decision of this court in said case of *Evansville vs. Dennett* was that this recital in the bonds of a particular resolution specifically by date "*did not put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms.*" Much less does the recital generally that a bond is issued in pursuance of an ordinance put the *bona fide* purchaser of such negotiable bonds upon inquiry as to the terms of such ordinance.

The statement of Circuit Judge Ross in the opinion of the two Judges of the Circuit Court of Appeals in the present case that "such bodies [as city councils] can only act by order, ordinance, or resolution, as every one is bound to know," was equally true in the case of *Evansville vs. Dennett;* and not only so, but it was expressly recited in the bonds in *Evansville vs. Dennett* that such action had been by ordinance and resolution, and, of course, those ordinances and resolutions were upon the records of the municipality in *Evansville vs. Dennett* as well as in the present case. It is so in the case of every municipality. There is nothing peculiar in this respect in the present case, but it stands on precisely the same footing as the case of *Evansville vs. Dennett.*

The charter of the city of Evansville (Sess. Laws, Ind., 1847, p. 9, sec. 26 *et seq.*), which was in force, and which applied in respect to the proceedings for the issue of the bonds there in question, as well as for other corporate proceedings, provided :

"The common council shall keep a full and fair record of all their proceedings. * * * The Clerk shall attend all meetings of the council, and make and

keep a record of their proceedings. * * * It shall also be the duty of the clerk to safely keep and preserve all records, books, and papers belonging to the city of Evansville, and appertaining to or deposited in his office, entire and without injury or mutilation, and to hand them over, together with all other property of said city in his hands, to his successor. * * * This act shall be deemed and taken to be a public act, and as such may be read as evidence in any court, without being pleaded or particularly referred to in pleading; * * * and transcripts of the records and proceedings of the said common council, certified by the mayor, under the corporate seal, shall be evidence in all courts," &c.

In all this there was nothing peculiar either to the city of Evansville or to the city of Santa Cruz. Substantially these provisions as to the keeping of records of proceedings are true of every municipality, and it is also true that such municipalities can only act by order, ordinance or resolution. The fact referred to by Circuit Judge Ross in giving the opinion of the two Judges of the Circuit Court of Appeals in the present case is that "such ordinance was a part of the public records of the city, which by its charter are required to be kept in 'large, well-bound, uniform and suitable books.'" This, as we have seen, was equally true in the case of *Evansville vs. Dennett*, as in the case of every other municipality. We refer to the language of Judge Ross on this point, because it shows the fundamental error which led to the decision of the Circuit Court of Appeals in the present case.

Negotiable municipal bonds payable to bearer are transferable by delivery, and, on general principles, a purchaser of them is not bound to examine the ordinances and proceedings under which they are issued. They are negotiable, and are not subject to any defense that certain facts existed outside of the bonds

themselves which constitute a defense to them, except the want of statute authority to issue bonds. Such negotiable bonds are designed to pass and do pass from hand to hand by delivery. Savings banks and other banks and trust companies and individuals purchase the same or lend money on the same on the delivery of the bonds to them, and they do this relying on the protection which their negotiable character gives to them. Thus, the 18 or 20 banks, trust companies or individuals who were the purchasers of the refunding bonds involved in the present case acquired the same relying upon their negotiable character.

For a court to hold that such bonds are non-negotiable, and that any bank, trust company or other purchaser must examine all the records of the municipalities issuing them would be to upset the universal course of dealing in these securities by all the savings banks and moneyed institutions in the country to the prejudice of the municipalities as well as the investors. The far-reaching and evil effect of any such decision is obvious. It would prevent the municipalities which rely upon the sale of such securities for the means of making permanent improvements, such, for example, as acquiring water works as in the present case, from making advantageous sales of such bonds, and would generally prevent the dealing in them by savings banks and other institutions which have money to invest or lend, because they would never buy or deal in non-negotiable paper on any such conditions. Of course, it is competent for the constitution or statutes of a State expressly to provide that municipal bonds shall not be negotiable, but shall be open to every defense to which a non-negotiable obligation would be subject, but it is easy

to see why they do not so provide. Thus, Mr. Justice HARLAN states in the recent case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255:

"Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Not only are negotiable municipal bonds generally not open to any such defense as that attempted to be raised in the present case, but especially is it true when the bonds, as do the present bonds, recite specifically the truth of the very fact the falsity of which is attempted to be set up as a defense. The statute of California now in question authorizes the issue by a city of refunding bonds to refund "*outstanding indebtedness evidenced by bonds thereof.*" The bonds in suit expressly recite that they are "issued by the city of Santa Cruz *for the purpose of refunding bonded indebtedness of said city*," and this express recital estops the municipality from showing the contrary—namely, showing that the bonded indebtedness which is refunded is not the bonded indebtedness of the city.

This court in the case of *Evansville vs. Dennett* answered in the affirmative the following question certified by the Circuit Court of Appeals:

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, [*i. e.*, that the bonds are issued "by virtue of an act" conferring upon the city the power to subscribe for stock and issue bonds] as against a *bona fide* purchaser for value of such bonds, **estop the City of Evansville from asserting that such bonds were**

not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed? "

And this court also in said case answered in the affirmative the last clause of the fifth question; namely:

" Or had such a purchaser the right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?"

Inasmuch as this case of *Evansville vs. Dennett*, 161 U. S., 434, is controlling, we feel justified in stating the same at considerable length, more especially as the Court held in favor of a *bona fide* holder that, though the bonds recited *a particular resolution of the city council by date*, and though such resolution was by law required to appear on the records of the city, nevertheless the *bona fide* holder of such bonds was not even put upon inquiry as to the terms or contents of such resolution, nor of ordinances also referred to in such bonds.

In that case bonds were issued under the provisions of section 30 of the charter of the city of Evansville, Indiana, approved January 27, 1847, which gave power to take stock in any chartered company for making roads to said city (Report, p. 437, bottom, p. 440, bottom). There were two sets of bonds involved in the Evansville case. Those issued to the Evansville, Henderson and Nashville Railroad Company contained the following recital:

" This being one of a series of three hundred bonds of like tenor and date, issued by the city of Evansville, in payment of a subscription to the Evansville, Hen-

derson and Nashville Railroad Company, made *in pursuance of an act* of the legislature of the State of Indiana and ordinances of the city council of said city passed in pursuance thereof."

The other issue of bonds recited as follows:

"*By virtue of an act* of the general assembly of the State of Indiana, entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27, 1847; and by virtue of an act of the general assembly of the State of Indiana, amendatory of said act, approved March 11, 1867, conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an amount not to exceed three hundred thousand dollars, bearing interest at the rate of seven per cent. per annum, for the purpose of paying the subscription as authorized above. The said city of Evansville hereby acknowledges to owe and promises to pay," &c.

The Supreme Court of the United States held that it must look alone to the city charter of 1847 for the power to issue the bonds, saying (p. 440):

"Under this presentation of the case we put aside the acts of 1865 and 1867, as giving no support to the rights of the plaintiff, and look alone to the charter of 1847."

The court then proceeded to state that this charter gave power to subscribe for stock, but only on petition of two-thirds of the residents of the city, &c., as stated

in section 30 of the charter, quoted in the Report, page 437, bottom.

The questions certified by the Court of Appeals to to the Supreme Court in that case are quoted above in this Brief (pp. 40–41). The Court answered all these questions in favor of the *bona fide* holder.

Quoting from *School District vs. Stone*, 106 U. S., 183, 187, the Court says (p. 443) :

" Bonds issued by municipal officers containing recitals by such officers that the bonds have been issued ' in pursuance of,' or ' in conformity with,' or ' by virtue of,' or ' by authority of,' the statute have been held in favor of *bona fide* purchasers for value **to import full compliance with the statute, and to preclude inquiry** as to whether the precedent conditions had been performed before the bonds were issued," citing various cases.

Then, referring to the case in hand, the court adds *(Ib.*, p. 443*)*:

" As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature."

We call the special attention of the Court to the fact that the precise question put by the Circuit Court of Appeals to the Supreme Court of the United States in this case of *Evansville vs. Dennett*, in the first question above quoted, was whether the recital in the bonds

that they were issued under " ordinances of the City Council put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued." Also, that the second question submitted was whether the recital in the other series of bonds that they were issued " by virtue of a resolution of said City Council, passed May 23, 1870," thus specifying and referring to the resolution by the exact date thereof, " put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms."

The Supreme Court of the United States answered both these questions in the negative. In other words, the Supreme Court of the United States has, in this case as in others, distinctly and emphatically laid down the doctrine that, while a purchaser of such negotiable bonds must examine to see if the constitution and statutes of the State confer authority to issue such bonds, and must also examine the form of the bonds and see what appears upon the face thereof, yet if the said bonds on their face conform to the statute and constitution and recite that they are issued " by virtue of " or " in pursuance of," &c., &c., authority of the provisions of a statute, the holder is not bound to go behind the statute conferring the power and ascertain by an examination of the ordinances, resolutions and proceedings of the City Council whether the city has complied with the provisions of the statute, or whether the facts exist which are required by the statute in order that bonds be issued.

Fundamental Principles of the Law of Negotiable Paper as Applicable to this Case.

These and other decisions of the Supreme Court of the United States are made in view of the great and fundamental principle involved in the negotiability of municipal bonds like other negotiable paper. The bonds are designed to pass from hand to hand upon payment of value therefor. The holder must look for constitutional and statute authority for the issue of the bonds, and must look at the bonds that he is buying, but he is not bound to look beyond this if the recitals in the bonds import a compliance with the constitution and statutes. Consider for a moment what an unreasonable and impracticable burden any other rule or principle would put upon the purchaser of municipal bonds. Nobody would be safe in buying them unless he or his attorney went personally and examined all the records of the municipality. In the present case this would have meant that the purchasers of these bonds would have to make a journey across the continent to examine all the records of the municipality. How many bonds would any municipality be enabled to sell if this were the law? The practical effect of any such rule would be to render all negotiable bonds non-negotiable. If a State desires that its municipalities shall not issue negotiable bonds it is very easy for the legislature so to provide; but, as was said by Mr. Justice HARLAN in the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255, 276:

"Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws,

shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Nothing Peculiar in the Case at Bar as to Keeping Records.

But it may be objected that in the present case the California statute required that "the notice of such election shall recite the indebtedness to be refunded." The court says that the action of the mayor and council was by ordinance, and that such ordinance was a part of the public records of the city, which by its charter are required to be kept "in large, well-bound, uniform and suitable books" (Opinion of Circuit Court of Appeals, Record, p. 314).

These provisions, however, are not peculiar to the present case. In the *Evansville Case*, 161 U. S., 434, the charter of the city of Evansville, **the very statute under which the bonds there in question were issued** (S. L. Ind., 1847, p. 9, § 26), provided, among other things, as follows:

"The common council shall keep a full and fair record of all their proceedings, and for this purpose shall appoint some person not of their body a clerk, who, before entering upon the discharge of his duties as such, shall take an oath of office, and give bond, with security to the acceptance of the common council, to secure the proper performance of his duties. The clerk shall attend all meetings of the council, and make and keep a record of their proceedings; and the minutes of the proceedings of each meeting being recorded, shall be read over in the presence of the council, and if incorrect, corrected, and when found correct, or made so, shall be signed by the mayor or other presiding officer of the meeting, and attested by the clerk, or other person acting as such.

"SEC. 27. It shall also be the duty of the clerk to safely keep and preserve all records, books, and papers belonging to the city of Evansville, and appertaining to or deposited in his office, entire and without injury or mutilation, and to hand them over, together with all other property of said city in his hands, to his successor, and to do and perform all other things and duties that he may be required to do by the by-laws, ordinances, rules, and regulations to be passed, ordained, and established by said common council: This act shall be deemed and taken to be a public act, and as such may be read as evidence in any court, without being pleaded or particularly referred to in pleading; and the printed by-laws and ordinances passed and ordained by said common council, and purporting to be printed by the order and under the authority of said common council shall be received and read in all courts as *prima facie* evidence without being specially pleaded or referred to in pleading: and transcripts of the records and proceedings of the said common council, certified by the mayor, under the corporate seal, shall be evidence in all courts, in like manner as the original would be, without other proof or authentication than such certificate and seal."

In the said case of *Evansville vs. Dennett*, 161 U. S., 434, the question presented to the Supreme Court of the United States was whether the ordinances and resolutions (kept of record under these express provisions of the charter of the city of Evansville above quoted) must be examined by the holder of a bond, which recited that it was issued under or by virtue of the charter of the city of Evansville. The Supreme Court held that the *bona fide* holder of such bond need not make such examination.

Note that in this **Evansville case the very act under which the bonds were issued required full and complete records to be kept.** It is not stated in the opinion of the Supreme Court, nor did that Court deem it material to state in its opinion what the ordinances of the city of Evans-

ville would have shown, or what the resolution of May 23, 1870, would have shown to the *bona fide* holders if they had been examined. What the Court held was that they **need not be examined for any purpose,** no matter what they contained ; that all that the *bona fide* holder of the bond needed to examine was the constitution and statute and the bond.

Hackett vs. Ottawa is a case directly in Point for the Petitioner.

The case of *Hackett vs. Ottawa*, 99 U. S., 86, unanimously decided by this court, Mr. Justice HARLAN delivering the opinion, is precisely in point. That case involved the validity of certain negotiable bonds issued by the city of Ottawa, Illinois. Under the charter of the city and the constitution of the State there was power to issue bonds for corporate purposes of the city. The bonds in question which had been issued by the city recited, among other things, that they were issued (p. 86) " by virtue of the charter of said city," also " in accordance with a certain ordinance passed by the city council of said city on the 15th day of June, A. D. 1869, entitled ' An ordinance to provide for a loan for municipal purposes,' which ordinance was ratified by a majority of all the qualified voters of said city at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city on the 30th day of July, 1869, entitled ' An ordinance to carry into effect the ordinance of June 15, 1869, entitled " An ordinance to provide for a loan for municipal purposes." ' " **The defendant pleaded as a defense to the said bonds that they were in fact issued and donated to one**

Cushman or the Ottawa Manufacturing Company, and that they were not issued for any municipal purpose whatever, and it was claimed that these facts appeared from the ordinance whose date and title were given on the face of the bonds. This court however, held that no such defense could be made as against the *bona fide* holder of the said bonds. Mr. Justice HARLAN, giving the opinion of the court says (pp. 90, 91):

"The bonds in suit upon their face import: 1st, That the faith of the city is irrevocably pledged for their payment. 2d, That they were issued in pursuance of the power which the council possessed to borrow money on the credit of the city and issue bonds therefor, and also in accordance with certain ordinances which provided for a loan for *municipal* purposes. The recitals of the bonds, in themselves, furnish no ground whatever to suppose that the council transcended its authority, or issued them for other than such purposes. They justify the opposite conclusion.

"The city, however, claims that they were not issued for municipal purposes, but as a simple donation to a private corporation, formed for business ends solely, and in no wise connected with or under the control of the city,—all of which, it is further claimed, appears from the ordinances, whose date and title are given in the face of the bonds.

"The ordinance of June 15, 1869, authorizes the mayor to borrow, in the name, for the use, and upon the bonds of the city, the sum of $60,000, 'to be expended in developing the natural advantages of the city for manufacturing purposes.' * * * The ordinance of July 30, 1869, was to carry into effect that of June 15, 1869. It directed the mayor to deliver the bonds to one Cushman, 'to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the sum in the improvement of the

water-power upon the Illinois and Fox Rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity."

It was contended, among other things, by the holders of the bonds that these were proper corporate purposes of the city. This Court, however, did not decide that question, Mr. Justice HARLAN saying (pp. 95, 96):

"But a direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois constitution, we pass to another point, which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the counsel, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. **The bonds in suit, by their recitals of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the**

representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him to dispute their validity. **Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter.** *Supervisors v. Schenck*, 5 Wall. 772. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defense. What this court declared, through Mr. Justice CAMPBELL, in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Co.* (23 How, 381), as to a private corporation, and repeated, through Mr. Justice CLIFFORD, in *Bissell v. City of*

Jeffersonville (24 *Id.* 287), as to a municipal corporation, may be reiterated as peculiarly applicable to this case: **"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and can not, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."**

The charter of the City of Ottawa contains the usual provisions as to keeping, and publishing from time to time a journal of its proceedings, especially ordinances authorizing the issue of bonds, as will appear by extracts from the charter of that city, given in the foot note.*

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* ART. 2, SEC. 9. The city council shall keep a journal of its proceedings, and from time to time publish the same, and the yeas and nays, when demanded by any member present, shall be entered upon the journal.

ART. 5, SEC. 3. The city council shall have power * * * * * to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof.

ART. 5, SEC. 38. The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, so that such ordinances be not repugnant to nor inconsistent with the constitution of the United States or this state.

ART. 5, SEC. 40. All ordinances passed by the city council shall, within one month after they have been passed, be published in some newspaper in the city, and shall not be in force, except as aforesaid, until they have been published as aforesaid.

ART. 5, SEC. 41. All ordinances of the city may [be] proven by the seal of the corporation, and when printed or published in book or pamphlet form, and purporting to be published by authority of the corporation as in force, the same shall be received in evidence in all courts and places without further proof.

ART. 10, SEC. 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for, by a majority of the voters of said city, attending an election held for that purpose.

Charter of City of Ottawa, Session Laws, Illinois, 1853, p. 296.

Graves vs. Saline County, 161 U. S., 359, is in point and controlling.

We next call the special attention of the court to the case of *Graves vs. Saline County*, 161 U. S., 359 (1896), for the following reasons:

1. That case, like the case now under consideration, involved the validity of *refunding bonds*, which stand upon a peculiarly favored footing.

2. The bonds which were refunded in that case had been decided by the Supreme Court of Illinois, 84 Ill., 292, and were admitted by the Supreme Court of the United States, 128 U. S., 526, 538, as stated in *Graves vs. Saline County*, 161 U. S., 359, 372, to have been void and uncollectible even in the hands of *bona fide* holders.

3. The recitals in the bonds which were held valid in *Graves vs. Saline County* were that they were issued "*for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county*," etc.; and the recital in the bonds in the present case is that they are issued "*for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California*" (citing the title of said act approved March 1, 1893). The defense of the city in the present case, contrary to the recital in the bonds, is that part of the old bonds refunded were not "bonded indebtedness of said city, just the same as in the case of *Graves vs. Saline County*, the defense attempted there, contrary to the

recital in the bonds, was that the old bonds of the Belleville and Eldorado Railroad Company refunded thereby were not valid bonds of the county, and hence could not be refunded under the Illinois act, which authorized counties to refund their outstanding bonds. The bonds now in suit also contain the recital that "all acts, conditions and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened and performed in due and legal form as required by law."

4. The statute under which the Saline County refunding bonds were issued required a record to be kept containing matters which if the bondholder was bound to notice would have shown the invalidity of the bonds which were refunded in that case.

As we consider the case of *Graves vs. Saline County* to be controlling and decisive in its facts and in its principles of the case at bar, we now state the same at considerable length. In that case the facts were that the County of Saline, State of Illinois, had issued $195,000 funding bonds under an act of February 13, 1865, and acts amendatory thereof, approved April 27, 1877, and June 4, 1879. These $195,000 of bonds were issued to fund one set of bonds formerly issued by the county in payment of the subscription to stock of the St. Louis and Southeastern Railway Company, and another set of bonds issued by the county to the Belleville and Eldorado Railroad Company. The Supreme Court of the United States expressly held and stated that the set of bonds issued to the Belleville and Eldorado Railroad Company were absolutely void even in the hands of *bona fide* holders, the court stating (p. 373) :

"If the present case stood only on the footing of the original conditional contract of subscription, we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that *the original bonds were uncollectible even by innocent holders.*"

The Supreme Court then proceeded to state and consider the fact that the said void bonds had been funded under the said statutes and by authority of a vote of the people of the County, and expressly held and decided that the funding bonds so issued were valid bonds of the County in the hands of *bona fide* holders. The questions certified by the Circuit Court of Appeals on this point were as follows (p. 367):

"FIRST. Is the County of Saline estopped by the recital in the funding bonds to assert that the bonds issued to the St. Louis and Southeastern Railway Company and to the *Belleville and Eldorado Railroad Company*, respectively, and for which the funding bonds were exchanged, were not binding, subsisting legal obligations of said county?

"SECOND. *Are the funding bonds so issued by the County of Saline legal, valid and binding obligations upon said county in the hands of a bona fide holder for value before maturity?*

"THIRD. If the court should be of opinion that the funding bonds are invalid, would it be competent for the court in this cause, which is a suit in equity instituted by the County of Saline to restrain officers of the law from levying and collecting a tax as required by law to pay the interest upon the funding bonds, to grant the relief asked only upon condition that the County of Saline pay to the holders the amount of the valid bonds issued to the St. Louis and Southeastern Railway Company which were exchanged for the funding bonds?"

And the court said in answering these questions (p. 375):

"We, therefore, answer the second question put to us by the Circuit Court of Appeals in the affirmative, and this renders a formal answer to the other questions unnecessary."

In this case of *Graves vs. Saline County*, the Statutes of Illinois, following the universal rule, required that the action of the county officers in issuing the funding bonds, like all other proceedings of the county, be *entered upon the records of the county*; and, if any one had examined those records and proceedings, he would have seen that those bonds were issued to fund other bonds issued to the Belleville and Eldorado Railroad Company, which last mentioned bonds were absolutely void. Not only so, but the statute under which these Saline County bonds were issued (S. L. Ill., 1879, p. 229, § 4) expressly provided, among other things, as follows:

"Upon the issuing of any new bond, or evidence of indebtedness, the clerk, or other officer having custody of the records of the fiscal matters of such county, city, town, township, school district or other municipal corporation, as the case may be, shall make registration thereof, in a book to be kept in his office for that purpose, showing the date, amount, number, class, date of maturity, rate of interest and place of payment of such new bond, or other evidence of indebtedness, and **the description of the bond or evidence of indebtedness, for which, or for the purchasing or retiring of which, the same was given,** as nearly as practicable."

An examination of this record and register kept of these Saline County funding bonds would have shown that these funding bonds were issued to take up the void bonds issued to the Belleville and Eldorado Railroad Company.

The Old Saline County Bonds Were Void, Even in the Hands of Bona Fide Holders.

The very point of the decision of the Supreme Court of the United States in this case of *Graves vs. Saline County* in regard to such funding bonds was that, although the original bonds which were funded were absolutely void in the hands of *bona fide* holders, yet the *bona fide* holder of the funding bonds was not bound to investigate and ascertain at his peril as to whether the funding bonds were issued to fund a valid debt of the county, but was protected by the fact that the bonds were negotiable and by the recitals contained therein. After the decision of the Supreme Court of the United States in *Graves vs. Saline County*, 161 U. S., 359, the United States Circuit Court of Appeals for the Seventh Circuit, in obedience to the decision of the Supreme Court of the United States, held in favor of the validity of the said bonds (see *Graves vs. Saline County*, 73 Fed. Rep., 920).

Gunnison County Case also a Controlling Authority for the Petitioner in this Case.

In the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255 (1899), this court unanimously held that the express recital in the bonds of Gunnison county that they did not exceed in amount the limit prescribed by the constitution of the State of Colorado estopped the county from showing by its records or other facts outside of the bonds themselves that the bonds themselves were in excess of the

limit. In that case also it was urged by the defendant county that the county was obliged to keep records which were public and open to all purchasers of bonds, and these records were introduced in evidence before the trial court as showing that the bonds had been issued in excess of the constitutional limit, and that they were therefore void. This court held that such admission of these records was error, and that the county was estopped by the recital in the bonds from making any such defense, although the records, if consulted, might have shown the illegality of the bonds in this respect.

We ask particular attention to the *Gunnison County case*, among other reasons, because it came before this Court on a writ of *certiorari* issued to the Circuit Court of Appeals for the Eighth Circuit. This Court considered the question involved in the *Gunnison County case* of such great importance that it issued its writ of *certiorari*, to bring the case before this Court for review. The same question precisely is involved in the present case, and is the one on which the present case was decided by both the Circuit Court and the Circuit Court of Appeals, and on which in the present case the Judges in the Ninth Circuit are evenly divided. The *Gunnison County case* involved especially the question whether the purchaser of municipal bonds was bound to notice the records of the municipality pertaining to the issue of such bonds. Additional time was allowed to counsel, and the case was, as this Court will recall, argued with great ability in behalf of the county by Governor THOMAS, of Colorado, and associate counsel, and the question upon which the Court of Appeals made the decision of the present case turn was thoroughly discussed

by counsel and fully and carefully considered by this Court in the said *Gunnison County case.*

We insist that the decision in this case by the Circuit Court of Appeals is directly in the teeth of the *Gunnison County case*, as well as the case of *Evansville vs. Dennett* and the case of *Graves vs. Saline County.* These three cases laid down, indeed, no new doctrine, for the same principle had been laid down by this Court, under substantially the same facts, in the earlier case of *Hackett vs. Ottawa, supra.*

In the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255 (in which case we were of counsel for E. H. Rollins & Sons), it was strenuously urged by Governor THOMAS in his brief and in his oral argument on behalf of Gunnison county that the *bona fide* holder of the Gunnison county bonds there in question was bound to examine the orders of the county commissioners of Gunnison county authorizing the issue of the refunding bonds, and that if he had made such examination he would have seen there a certificate of the county commissioners stating the amount of indebtedness of the county, and showing that it was beyond the limit prescribed by the constitution and statutes of the State. He says (His Brief, p. 40):

"Indeed, our contention is that the purchaser of bonds, or any other form of county indebtedness, *is bound to take notice of every county record open to public inspection* which contains a statement of the county indebtedness, whether it be a warrant register setting forth the warrants that are issued from day to day, a bond register setting forth the amount of bonds issued from time to time, the semi-annual statements of indebtedness (which are nothing but trial balances struck twice a year), a certificate required to be made before the bonds are issued, *or any other public record of any kind, nature or description* that is open to the inspection of everyone."

We have said above that the Gunnison case is in point and controls the case at bar. This we have said deliberately because the whole defence of Gunnison County in the case was that the bondholder was bound *under the legislation of Colorado to take notice of the records of the county*, and that if such notice was taken the records would show on their face that the county was indebted beyond the constitutional limit, and to this end the defendant county introduced these records in evidence, and the whole stress of the case was whether under the recitals in the bonds a *bona fide* holder thereof was bound to take notice of the records, and this Court held that he was not. In support of his contention Governor THOMAS cited the same cases that are cited in the opinion of the Circuit Court of Appeals in the present case, to wit: The case of *Dixon County vs. Field*, 111 U. S., 83, also the case of *Sutliff vs. Lake County Commissioners*, 147 U. S., 230. Governor THOMAS also cited the general county act of Colorado as to publishing and entering of record a statement of the county indebtedness, which act applied to every county in the State. It applied as much to *Gunnison* county as it did to *Lake* County, the defendant in the case of *Sutliff vs. Lake County Commissioners*. Section 30 of the said statute of the State was as follows:

"An act concerning counties, county officers and county government and repealing laws on these subjects, approved March 24, 1877.

* * * * * *

"SEC. 30. It shall be the duty of the Board of County Commissioners of *each county* to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and, if there be no newspaper published in the county, such Commission-

ers shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the Court House door, and *such statement shall show the amount of debt owing by their county*, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the *statement thus made, in addition to being published as before specified, shall also be entered of record* by the Clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times *(Session Laws, Colorado 1877, pp. 218, 227)*."*

Governor THOMAS urged (and, of course, correctly on this point) that this Section 30 applied to *every county*, Gunnison County as well as Lake County. He also urged that the debt statements made under this section constituted a public record, of which every bond purchaser had constructive notice. He also argued that all other "records" of the county were constructive notice, especially the orders of the county board of commissioners authorizing the refunding bonds.

This *Gunnison county case* was argued at the bar at great length by a large number of counsel, extra time being given by the court for the purpose, and the Supreme Court finally rendered its decision, in which it

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* The above Section 30 is carried into the General Laws Compilation of 1887 and numbered therein as Section 457 of such Compilation.

held that the Gunnison county bonds were valid in the hands of *bona fide* holders, holding among other things, that the *bona fide* holder was not bound to examine the orders, proceedings or records of the county, nor the so-called financial statements entered upon the records of the county, although, if he had consulted them, he might have had notice that the refunding bonds were issued to refund invalid warrants. This decision in the *Gunnison county case* proceeds upon the true and correct ground of giving full meaning and effect to the negotiability of municipal bonds and to the recitals therein. This is a distinct decision to the effect that the holder of negotiable bonds is not bound to examine the ordinances, orders, resolutions and other proceedings for the issue of the bonds. The court, HARLAN, J., in concluding its unanimous opinion, says (p. 275):

"It is insisted with much earnestness that the principles we have announced render it impossible for a State by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a State constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But, for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

The opinion of the court does not expressly enumerate all the orders, financial statements, records and

proceedings which the defendants introduced in evidence over the objections and exceptions of the plaintiff in that case. In regard to these the court says (p. 276):

"What has been said renders it unnecessary to consider various questions arising upon exceptions to specific rulings in the Circuit Court as to the admission and exclusion of evidence, and as to those parts of the charge to which objections were made. *Those rulings are inconsistent with the principles herein announced.*"

California Case Directly in Point in Plaintiff's Favor.

In *State of California vs. Wells, Fargo & Company*, 15 Cal., 336 (1860), the Supreme Court of California held that bonds issued by the state to fund warrants of the state were negotiable instruments and binding upon the state, although the warrants which had been refunded had been so refunded by mistake by the state treasurer, said warrants having been theretofore paid and cancelled, and, after such payment and cancellation, having been stolen from the office of the treasurer, and presented for funding, and having been funded by the issue of the bonds. The court says (p. 341):

"These bonds, issued under the circumstances, are unquestionably negotiable instruments and binding upon the State, in the hands of an innocent assignee. The principle has been settled in the cases of *Delafield v. The State of Illinois;* (8 Paige, 533); 2 Hill, 177; 26 Wend. 192 and in other cases."

It was urged on behalf of the state that Wells, Fargo & Company, who innocently received the paid and stolen warrants, and received the funding bonds in

place thereof, were bound to know the facts, and ought to have searched the records of the state. On this point the Supreme Court said (p. 342):

"It is said that the defendants were bound to know the facts. We do not perceive the force of this suggestion, or why they should be held to any greater knowledge than the regular agents of the State, whose office and duty it was to ascertain the facts, and to protect the public interests. But it cannot be held that every man who deals with State securities is bound to search the books and records of the State officers before proceeding to take an assignment of the claim against the State."

Wesson vs. Saline County, also in Point in Plaintiff's Favor.

In *Wesson vs. Saline County*, 34 U. S. App., 680, 73 Fed. Rep., 917, before HARLAN, WOODS and JENKINS, JJ. (1896), in the Circuit Court of Appeals for the Seventh Circuit, the constitution and statutes of Illinois applicable to the bonds there in question authorized a *subscription* to the capital stock of a railroad company, but did not authorize a *donation*. **An examination of the proceedings and orders of the county court of Saline county would have shown to any one that the bonds were issued for a donation.** The precise question was whether the holder of the bonds, with the recitals therein contained, was bound to make such examination. If he was, then the bonds were invalid, even in the hands of a *bona fide* holder. The Circuit Court of Appeals for the Seventh Circuit had formerly decided a number of cases in which they had held such bonds invalid, even in the hands of a *bona fide* holder; but after the decision of the Supreme Court of the

United States in the case of *Evansville vs. Dennett*, 161 U. S., 434, the Circuit Court of Appeals for the Seventh Circuit reversed its former decisions, holding them overruled by the Supreme Court of the United States in *Evansville vs. Dennett*, and held that a *bona fide* holder of such bonds, with such recitals, was not bound to examine the records of the county for any purpose, and the bonds were held valid in the hands of such *bona fide* holder.

In a note at the end of the decision, it is stated that "Mr. Justice HARLAN sat at the hearing, but did not participate in the decision."

The Circuit Court of Appeals for the Seventh Circuit had previously held in *Post vs. Pulaski County*, 9 U. S. App., 1, that the

"recital in the bonds that they were issued pursuant to an order of the county court put whosoever should come into possession of those bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order.

This holding the Supreme Court of the United States overruled in *Evansville vs. Dennett*, *supra*.

In giving its opinion in the *Evansville case* the Court also says (p. 443):

"As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the City Council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature."

This decision of the Supreme Court of the United States, made upon great deliberation, and overruling

prior decisions of the Circuit Court of Appeals of the Seventh Circuit from which the *Evansville case* came, fully accords with and follows its prior decisions, and it completely negatives the position taken by the City of Santa Cruz when it asserts that the plaintiff, as the *bona fide* holder of the bonds and coupons in question, is put upon inquiry as to the terms of the ordinances, notices and resolutions under which these bonds were issued, and charged with knowledge of their contents.

Note that the recitals in the bonds in the case of Evansville vs. Dennett were very much weaker than the recitals in the bonds now in question ; and yet the Court had no hesitation in arriving at the conclusion that the bona fide holder was protected by even those recitals in the bonds, and was not bound to consult the ordinances and resolutions of the City Council.

After this decision by the Supreme Court of the United States, the case of *Wesson vs. County of Saline*, 73 Fed. Rep., 917, came before the United States Circuit Court of Appeals for the Seventh Circuit. That case was similar to the case of *Post vs. Pulaski County*, *supra*, and the Circuit Court of Appeals, WOODS, J., said (p. 919) :

" But the proposition enunciated in Post vs. Pulaski County, that ' the recital in the bonds that they were issued pursuant to an order of the County Court put whosoever should come into possession of those bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order,' is inconsistent with, and

must be regarded as overruled by the recent ruling of the Supreme Court in the case of City of Evansville vs. Dennett, supra, where it was held that a recital that a subscription to the stock of a railroad company was 'made in pursuance of an act of the Legislature and ordinances of the City Council, passed in pursuance thereof * * * imported not only compliance with the act of the Legislature, but that the ordinances of the City Council were in conformity with the statute.' That is necessarily so, if the recitals in municipal bonds are not to be denied significance. The only reason for saying that a reference to an ordinance puts a party upon inquiry into the contents thereof is because the reference conveys knowledge of the existence of the ordinance. But Common Councils, Boards of Commissioners and like municipal bodies can act only by order, ordinance or resolution, as every one is bound to know; and, when a municipal bond is offered upon the market, it needs no mention in a recital to give a proposed purchaser notice that the bond was issued in pursuance of an order, or resolution, or ordinance. The existence of the bond implies that much, and when there is a recital to the effect that the bond was issued in pursuance of a statute, the necessary import is that there was an ordinance, and a proper one, whether express mention is made of it or not. To say, 'in pursuance of a statute and an ordinance,' is equivalent to an express statement that the ordinance is in conformity with the statute, and the purchaser of a bond containing that recital is not bound in that particular to look for further information."

Nothing Peculiar in this Case as to Any Record to be Kept by the Municipality, or to take it out of the Established Doctrine of this Court.

As stated above *(ante,* p. 13*)*, Circuit Judge GILBERT gave a dissenting opinion in the present case (Record, p. 316), to which we call the special attention of this court, and which we submit is both on principle and

authority conclusive in favor of the validity of these bonds. The learned Judge cites numerous cases of this court supporting his opinion. Among other things, he says (Record, p. 320) :

"In the latter case [*Evansville vs. Dennett*, 161 U. S., 434,] the bonds contained the recital that they were issued by virtue of a certain designated act of the legislature as well as by virtue of a resolution of the city council, ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription. The court said: 'As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature.' "

We do not quote the whole of Judge GILBERT'S opinion, but respectfully request this court to read it in its entirety. He says among other things (Record, p. 317) :

"In the present case the opinion of the majority of the court seems to have been influenced by the fact that by the charter of the city of Santa Cruz a public record of its ordinances is required to be kept in books accessible to the public, and by the further fact that the city officers who were impliedly authorized to issue the refunding bonds were not expressly empowered to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness for the payment of which the refunding bonds were issued. As far as the first consideration is concerned, it is sufficient to say that the charters of all municipal corporations require similar public records of their proceedings, and that such was undoubtedly the case with the city of Ottawa; yet in *Hackett v. Ottawa*, the court deemed that fact im-

material to the question which was before it, held that a purchaser of bonds was not bound to inspect such records, and disposed of the case upon the general principles of estoppel applicable to all cases. Neither can any distinction between that case and the case at bar be predicated upon the fact that the act of March 1st, 1893, under which the refunding bonds of the city of Santa Cruz were issued, conferred no express power upon the officers of the city to certify to any particular fact in connection with the proceedings on which the bonds were issued, or to make any recitals whatever upon the bonds. The proceedings were had under a statute that not only conferred authority to refund the bonded indebtedness but imposed a duty upon the city to determine whether the occasion had arisen to refund, and if so, to determine wherein the bonded indebtedness consisted, and the nature and amount thereof. Under this authority the city determined that the Water Company's bonds were a portion of its bonded debt, and as such subject to be refunded. The officers of the City of Santa Cruz who executed the refunding bonds were the officers whose duty it was to issue them. Before doing so they were obliged to determine for themselves that the antecedent steps had been taken which were indispensable to the issuance thereof, and they were empowered by an ordinance of the city to recite upon the bonds the facts usually recited upon such instruments—the facts upon which the purchaser was authorized to proceed and on which he might rely as was done in the Ottawa case. The bonds were executed under the seal of the city and were signed by the mayor and the city clerk. These were the officers whose duty it was to sign such instruments. Said the court in the *Town of Coloma v. Eaves*, 92 U. S. 484, 488: 'At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine

whether the requirements of the act prior to a subscription to the stock of a railroad company had been met.' The bonds in question in the present case contain a recital that they were issued 'for the purpose of refunding the bonded indebtedness of said city,' in pursuance of the act of March 1st, 1893, 'and in pursuance of, and in conformity with, the constitution of the state of California, and the ordinances of the city of Santa Cruz, and in pursuance of, and in conformity with, a vote of more than two thirds of all the qualified electors of said city, etc.,' and contained the certificate, 'that all acts, conditions, and things required by law to be done precedent to, and in the issue of said bonds, have been properly done, happened and performed, in legal and due form, and as required by law.' Here is a distinct certificate that the bond was issued for the purpose of refunding the bonded indebtedness of the city. This recital was expressly authorized by an ordinance of the city before the bonds were issued."

The learned Judge thus states and shows, and we also show in this brief, that there *is nothing peculiar in the charter of Santa Cruz as to a public record of its ordinances being kept.* The same thing is true of every municipality, and has been true in all the numerous cases decided by this court, in regard to the effect of recitals in negotiable municipal bonds.

Officers of municipalities charged with the duty of issuing bonds have power to make recitals therein, and it is not necessary that the statute give express power to make recitals.

It was strenuously urged by counsel for Gunnison County in the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255, that county officers had no power or authority conferred either by constitution or statute to make any recital on the

question whether the debt limit prescribed by the constitution had been exceeded. It was urged that to permit such power would be to permit a mere officer of a municipality to recite away the provisions of the constitution. But the Supreme Court of the United States distinctly held contrary to this argument, and held such power to exist. There was not in that case any express power conferred either by constitution or statute upon the county officers to make findings and recitals in the bonds, yet the Supreme Court of the United States had no hesitation in holding that such power existed. This power to make the recitals results from the mere fact that these matters are by the statute committed to the officers of the municipality. The constitution and the statutes contemplate that some body of men shall act for and on behalf of the municipality. There is no other administrative or executive body to represent the city or to speak for it in city matters. They are the agents of the city elected by the people of the city and identified with the city, and the city is bound by their acts and representations made in the performance of the duties committed to them by the statutes. Inasmuch as the city has chosen its own officers and agents, and hold these out to the public as their duly accredited agents and officers, the people of the city, alike by every principle of law and morality, are bound and estopped by the acts and representations of such officers and agents as against innocent third persons with whom they have dealt in city matters. The city and the people of the city held out these officers as representing the city and cannot be heard to assert the contrary.

In order that officers or boards of municipalities may have power to make findings and recitals in bonds it is not necessary that the statutes expressly confer upon such officers or boards power to make such findings and recitals. The fact is, as stated by the Supreme Court of the United States, that "such express direction and authority are seldom found in acts providing for the issuing of bonds." On this point it is enough in this Court to refer to the decision and language of the Supreme Court of the United States in *Bernards Township vs. Morrison*, 133 U. S., 523, 527, as follows:

"It were useless to refer to the long list of cases in which recitals, like these, have been held sufficient to sustain bonds in the hands of *bona fide* holders. It is urged that these commissioners were not elected by the people; that they were not the general officers of the township, but were special officers appointed by the Circuit Court—special agents as it were, for the specific purpose; **that the statute does not in terms give them authority to determine whether the preliminary conditions have been complied with**; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. The organization of townships, the number, character and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality. But these special commissioners were not the only officers of the township whose acts gave currency to these bonds. If inquiry had been directed to the county and township records the affidavit of the township assessor to the consent required would have been found; and on the

face of the bonds it appears that the county clerk of the county has added his official certificate to their validity; so that the acts of general as well as of special officers and agents of the township are the foundation upon which rests the validity of these bonds.

"While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon vs. Jennings*, 119 U. S., 74, 92, the rule is thus stated by Mr. Justice BLATCHFORD: 'Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the "corporate authorities" to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with."

"Whatever may be the hardships of this particular case, to sustain the defenses pressed would go far towards destroylng the market value of municipal securities. We see no error in the ruling of the Circuit Court, and its judgment is therefore affirmed."

The express and specific recitals in the bonds, as well as the general recitals, estop the city from showing that part of the bonds refunded were not bonds of the city.

The bonds in the present case expressly recite not only that they are

"issued by the said city of Santa Cruz for the purpose of refunding **the bonded indebtedness of said city**" (the exact language of the statute), but also that they are

"issued * * * under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, entitled," &c.

and also specifically recite as to the notice of election:

"Notice thereof having been duly and legally given and published in the manner as required by law."

Under the numerous decisions of the Supreme Court of the United States the *bona fide* holder of these bonds was not bound to look further and to examine the ordinances or notice of election authorizing these bonds. These bonds expressly and specifically recite that they are issued to refund **"the bonded indebtedness of said city."** This recital estops the city from asserting that what was refunded was not "the bonded indebtedness of said city." So also these bonds expressly and specifically recite **"notice thereof** [that is, of the election] **having been duly and legally** given and published in the manner required by law." This recital also estops the city from showing that the notice of election was not "duly and legally given;" in other words, provided for voting upon refunding such bonds only as the statute authorized to be refunded. So, also, the general recital that the bonds are **"issued * * * under and in pursuance of and in conformity with the provisions of an act entitled,"** &c., estops the city from showing that the provisions of that act were not followed in issuing the bonds, as respects the bonds refunded, being city bonds, as well as in all other respects.

Vote of the People of the City and its Legal Effect.

The question was submitted pursuant to the Refunding Act of March 1, 1893, to a vote of the people of the city whether or not the indebtedness represented by the Water Company bonds, assumed by the city, as well as the other bonds of the city, should be refunded by the issue of the very bonds now here in question, and the people, at an election held on Tuesday, March 13, 1894, by a vote of 735 votes "for refunding the indebtedness" (including these Water Company bonds assumed by the city as fully set forth in the notice of election) and 22 votes against the same, voted in favor of refunding said bonds (Findings of Fact, Number 6, Record, p. 19 and Ordinance declaring result of Election, Record, p. 211).

The notice of election mentioned and described fully the $89,000 water company bonds by name, and people of the city, with this knowledge, voted to refund these bonds by the issue of the negotiable bonds now in question, containing the recital that they are issued "for the purpose of refunding the bonded indebtedness of said city," the form of new bonds being set forth in notice of election. The city and its voters should be held to the representations and recitals in these refunding bonds.

The notice of election distinctly informed the citizens and voters of the City of Santa Cruz that the city

council intended to refund the $89,000 bonds of the City Water Company, which had been assumed and agreed to be paid by the city. The said notice of election is as follows (Additional Finding of Fact No. 2, Record, p. 34):

"NOTICE OF SPECIAL ELECTION.

To the qualified electors of the city of Santa Cruz, and to all whom it may concern:

Notice is hereby given that a special election has been duly and regularly called, and will be held in and for the city of Santa Cruz, on Tuesday, the thirteenth day of March, 1894, at which there will be submitted to the qualified electors of said city the question of refunding the following bonded indebtedness of said city of Santa Cruz, issuing bonds therefor and providing for the payment of the same, viz:

* * * * * *

(2) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893), of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company, of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company, of New York, as trustee, party of the second part therein, and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz;" etc.

Thus the people of the city of Santa Cruz were distinctly and specifically informed that these $89,000 water company bonds were to be refunded if the people so voted, and the people did so vote.

Furthermore, the people of the city of Santa Cruz were distinctly and specifically informed that these bonds were to be refunded by the issue of *negotiable* bonds, that is, bonds payable to bearer, and passing from hand to hand by delivery. The notice of election set forth the form of the refunding bonds (Record, p. 36). Still further, the said refunding bonds, the form of which was set forth in the notice of election, recited that they were issued

" for the purpose of refunding *the bonded indebtedness of said city* and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, entitled ", etc. (giving the title of the refunding act approved March 1, 1893).

The voters of the city of Santa Cruz, by ~~735~~ 538 votes for and ~~22~~ 57 votes against, thus expressly and distinctly authorized the issue of these refunding bonds to refund the $89,000 water company bonds, and authorized the issue of such negotiable refunding bonds, payable to bearer, and containing the recital above quoted, that they were issued " for the purpose of refunding the bonded indebtedness of said city."

The question put to the qualified electors was distinctly whether the city should issue bonds of said city under the provisions of the said refunding act of the State of California, that is, issue *negotiable* bonds, which should pass from hand to hand by delivery and come, as these bonds have, into the hands of innocent holders for value. Afterwards, pursuant to, and expressly authorized by, such vote of the people, the city council issued the refunding bonds now in question. When it comes to a question which should suffer, if the act of voting and issuing the bonds was illegal, there

can be but one answer, either under strict law or moral justice: the city, and not the innocent holders of the bonds.

If the City ever intended to question or repudiate, or attempted to question or repudiate, these bonds of the water company which the city had assumed on the purchase of the water plant, that would have been the time for it to do so; but, instead of doing so, the people of the city, by their vote, with practical unanimity, agreed that this bond indebtedness should be paid as the bonds of the city, and that refunding bonds should be issued therefor.

Not only did the people of the city of Santa Cruz, by a vote of 735 votes for to 22 against, the issue of these refunding bonds expressly authorize their issue, but not one person in all the city of Santa Cruz made any effort to prevent as illegal the issue of bonds to refund the $89,000 water company bonds. This thing was not done in a corner. The proceedings for the issue of these bonds were all open and public, thoroughly advertised, and known to everybody in the city. No injunction proceedings to stop the issue of these refunding bonds were taken by any interested person. The city officers issued these refunding bonds, acting by this unanimous vote and sanction of the people of the city, and no hand was raised to stop them. The city and its officers thus authorized and issued these bonds, well knowing that they might come into the hands of innocent purchasers. Under these circumstances there can be but one answer to the question as to whether, under the law, as well as under moral justice, the innocent bondholder should suffer, or the citizens of the city of Santa Cruz should suffer, for the refunding of these $89,000 water company bonds, sup-

posing that such refunding was not authorized by the statutes of the state.

We may here pause to quote from the language of the late Chief Justice of this Court in the somewhat similar case of *Jasper County vs. Ballou*, 103 U. S., 745—language which is especially pertinent to the facts just stated. Mr. Chief-Justice WAITE, giving the unanimous opinion of the court, there said (p. 751):

"When, therefore, the people were called on to vote whether the old bonds should be funded, the facts they had to consider were these: A valid law authorizing the subscription and an issue of the bonds had been passed. The people, at an election which had been irregularly called, had voted to make the subscription and issue bonds bearing ten per cent. interest, and all payable within six years. An act had been passed to legalize the election, and under it the subscription which had been voted was made, and bonds such as were contemplated had been issued and were then outstanding in the hands of various parties. Whether these bonds were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as 'binding and subsisting legal obligations,' and issue in lieu of them other bonds having twenty years to run and bearing seven per cent. interest instead of ten; and they, by their vote, said they would. There is no complaint of any illegality in this election, or of fraud or imposition. So far as the record shows, the proposition to fund went from the county authorities to the bondholders, and not from the bondholders to the county. The facts were as well known to one party as the other. If the people intended to rely on their defenses to the old bonds, then was their time for them to speak and by their vote say they would not recognize them as binding obligations. By voting the other way, they, in effect, accepted them as legal and subsisting for the purposes of the proposed extension of time at reduced interest, and said to the holders, if the proposition was accepted, no question of illegality

would be raised. Their offer having been accepted, they are now estopped from insisting upon an irregularity which they have by their votes voluntarily waived, with a full knowledge of the facts. The case is clearly, as we think, within the principle acted on by the Supreme Court of the State in *President and Trustees of the Town of Keithsburg vs. Frick, 34 Ill., 405.* **As was very properly said below by the learned circuit judge 'there must be an end of these contests and defenses some time or other.' There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law' for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligation must be considered as ended.**

"This disposes of all questions as to the excessive issue of bonds. For all the purposes of this case the original bonds must be taken as binding. The issue of the funding bonds did not increase the aggregate of the indebtedness of the corporation, but only changed its form."

So, also, the language of the Supreme Court in the case of *Graves vs. Saline County*, 161 U. S., 359, is likewise especially pertinent. Mr. Justice SHIRAS, giving the unanimous opinion of the Court, there says with regard to certain refunding bonds of Saline County (in that case refunding void bonds) (p. 374):

"But when, in pursuance of the funding laws, the question whether the outstanding original bonds issued to the Belleville and Eldorado Railroad Company should be refunded in new bonds was submitted to the same constituent body that authorized the original issue, and when, in accordance with the vote so taken, and in formal compliance with the other directions of

the funding laws, negotiable securities were issued and delivered in payment of the outstanding bonds, we know of no principle of law which forbids the county of Saline from such honorable discharge of its liabilities in the hands of innocent holders"

These decisions of the Supreme Court of the United States in the cases above referred to harmonize with the general doctrines and principles of the law as to negotiable paper and as to constructive notice.

Further as to doctrine of constructive notice generally.

No ordinance, notice of election or any "record" is constructive notice as to any negotiable paper unless a statute expressly so provides, and there is no such statute in California.

The proposition that the ordinance and notice of election are constructive notice to every holder of bonds as against the contrary specific and positive recitals in such bonds, and that they are constructive notice in the absence of any statute which so provides recital or no recital, seems to us to be an alarming and revolutionary principle in regard to negotiable instruments for the payment of money. The general principle, we take it, is well settled that, in order to render a thing constructive notice, some statute must so provide. This is the principle laid down by the Supreme Court in the case of *Burck vs. Taylor*, 152 U. S., 634, 654 :

"If notice was essential to charge them, actual notice should have been given, at least in the absence of any statute providing some means for constructive notice."

The principles and rules as to constructive notice have had an extensive application in regard to conveyances of real estate in this country. The statutes of most, if not all, of the States expressly provide for a public office, known as the registry of deeds, where conveyances of real estate may be recorded. Such office is provided with books and indexes and is open to the public at all times, and any person interested may go and examine such books ; and these statutes *in all cases* further expressly provide that the record of an instrument, duly executed and duly acknowledged, shall be constructive notice of such instrument to all subsequent purchasers of the real estate affected thereby. The opening of the public office and the recording of these deeds without such provision that the deeds so recorded shall be constructive notice would have no effect as giving constructive notice to any one. This is evident from the numerous decisions of the courts to the effect that where a deed is improperly recorded (as, for example, where it has been improperly acknowledged), the record of it in the public records is not constructive notice to a subsequent purchaser. Why? Because in the absence of a statute which expressly so provides such record is not constructive notice.

In 20 American and English Encyclopædia of Law, page 600, summarizing the established rule of law, it is said :

" If an instrument is either not authorized by law to be recorded, or is not authorized to be recorded by reason of its defective execution or the failure to comply with the prerequisites to recordation, its enrollment on the records is of no effect, and it cannot be said that it will charge with constructive notice."

In *McEwen vs. Den*, 24 How., 242, the Court said (p. 244) :

" The deed offered in evidence was recorded without legal proof of its execution, and, therefore, a copy of the record could not be evidence. The court erred in admitting the copy to go to the jury."

In *Olcott vs. Bynum*, 17 Wall., 44, the Court said (p. 59):

" The original deed from Hovey to Olcott and Stevenson never having been registered, *and the registration of the copy being unauthorized*, it follows that the certified copy of the registered copy was a nullity, and could give no legal right to the grantees which the Circuit Court could recognize."

In *Buel vs. Irwin*, 24 Mich., 145, the Court said:

" Apart from the curative act of 1861, this certificate was plainly insufficient to authorize the deed to be recorded. To entitle a deed to registry, its execution by the grantor must be proved or acknowledged, and when acknowledged the evidence of the acknowledgment of execution by the grantor must appear by the certificate, and if the acknowledgment is taken abroad, before a Michigan Commissioner, his certificate must be authenticated by his seal. In this case, the certificate does not show that the grantor acknowledged that *he* executed the deed, and, hence, if otherwise regular, the certificate would be bad, and the proof of execution of the deed, required by the statutes as a prerequisite to registry, would be wanting (*Haden vs. Westcott*, 11 Conn., 129)."

In *Ely vs. Wilcox*, 20 Wis., 523, the Court held that, for want of a certificate of a Clerk that the notary taking the acknowledgment was such, and that his signature was genuine, the deed was not authorized to be recorded, and was, therefore, not notice to any one. Other decisions are cited in a note to this case in 91 Amer. Dec., 436.

Mr. Wade says: " The requirements of the statute, both in regard to the official character of the acknowledging officer and the contents of his certificate, must be complied with in every substantial particular, or the

record of the instrument will be inoperative as constructive notice."

Wade on Notice, 2d Ed., Sec. 124.

In *St. John vs. Conger*, 40 Ill., 535, the Court said :

"It is insisted that the record of the copy of the deed from Madison County was sufficient to put subsequent purchasers upon inquiry. *To hold that parties ought to have been put upon inquiry by this record would be precisely the same thing as holding them affected with notice.* This would be giving to the record of an instrument, not entitled to be recorded, the same force as to notice that we give to one legally reduced to record. We do not think any authority can be found in support of this proposition. On the contrary, the familiar rule, and one laid down by this Court, is that the record of an instrument not entitled by law to be recorded is of no avail as notice *(Moore vs. Hunter*, 1 Gilm., 317*)*. It is said that a purchaser, as a matter of fact, receives the same information from the record of a copy as from the record of an original instrument. That may be true. But the broad difference is this : The statute only authorizes the record of original instruments, and it makes that record conclusive evidence of notice. It matters not that a subsequent purchaser has not, as a matter of fact, seen the record. If the instrument has been legally recorded, the law presumes him to have seen it, and holds him to the consequences of such knowledge. Not so as to the registry of a copy. It may be that if a party can be clearly proven to have read the record, he should be held to have derived from it the same degree of actual knowledge that he would have derived from seeing a copy of an instrument in the hands of a private individual. He might be considered as put upon inquiry. But the law does not presume him to have read the record of an instrument not authorized to be recorded. In the case before us there is no evidence that the defendant, and the intermediate parties through whom he claims from the heirs of McNemony, had actual knowledge of the record of the copy or had ever seen such record."

If such deeds *actually upon the registry* (but not entitled to be there) are not constructive notice to a per-

son who confessedly has constructive notice of whatever is required to be there, much less is the notice of election in the present case constructive notice to any one, for no one need examine the ordinance to see the notice of election, as the statute does not require the ordinance to set forth the notice of election.

It is true that ordinarily the purchaser of a piece of *real estate* must take notice of any judgment and litigation in the courts of general jurisdiction affecting the title of such real estate. But real estate is property *not negotiable according to the law merchant*, and an entirely different rule prevails with regard to judgments or litigation affecting negotiable instruments.

As to Constructive Notice in Case of Negotiable Paper.

How free negotiable paper is from any "*constructive* notice" is seen from the following, to wit:

The purchaser of negotiable paper is not bound to take notice (that is, does not have constructive notice) of any litigation pending, or any judgments which may have been previously rendered regarding such negotiable paper.

This principle has been repeatedly decided by this court.

That a pending suit, or a judgment in any suit regarding negotiable bonds, is not constructive notice to a *bona fide* purchaser thereof was well settled by this court upon great consideration in the case of *County*

of Warren vs. Marcy, 97 U. S., 96. This court states as follows the question there presented (p. 105).

"This brings us to the second question; namely, whether the pendency of the chancery suit for vacating the proceedings of the supervisors, and preventing the issue of the bonds in this case, was in itself constructive notice to all persons of their invalidity, or of the objections raised against them. This question has an important bearing upon the case, for, whilst the bonds may be valid in the hands of a *bona fide* purchaser before maturity, and without notice of any defect or vice in their origin, this cannot be said in reference to one who has such notice, or who is chargeable therewith."

The court, after full consideration of the matter and review of the numerous authorities, answered that question in the negative.

So. also, this court in the case of *Carroll County vs. Smith*, 111 U. S., 556, said (p. 562):

"The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality by virtue of the doctrine of *lis pendens (County of Warren vs. Marcy*, 97 U. S., 96*)*."

See also to the same effect:

Orleans vs. Platt, 99 U. S., 676.
Cass County vs. Gillett, 100 U. S., 585.
Thompson vs. Perrine, 103 U. S., 806.
1 Dillon *Munic. Corp.*, 4th Ed., Sec. 514, and cases cited in State as well as Federal courts.

Actual Bad Faith on Bondholder's Part Must Exist in Order to Affect Him With Constructive Notice.

There is also another principle which is especially pertinent to the present case.

Where it is sought to affect the bona fide purchaser of negotiable paper with constructive notice, the question is not whether there were grounds of suspicion, or even gross negligence on his part, but the question is whether he has acted in bad faith.

In *Murray vs. Lardner*, 2 Wall., 110, Murray had loaned money on some coupon bonds payable to bearer, to a person whom he did not know, and under circumstances which might, perhaps, have excited suspicion as to the title of such person to the bonds. The Court, in its charge, submitted to the jury (p. 113) :

" Whether there were such circumstances of the character which I have described to you as would warrant the inference that there was ground of suspicion, and that he should have made further inquiry as to the character of the paper."

The Supreme Court of the United States held that this was error, and reversed the judgment. The Court (Mr. Justice SWAYNE delivering the opinion) in reviewing the English cases and preceding cases in this Court, says (p. 121) :

" In *Goodman vs. Simonds*, 20 Howard, 343, the subject was elaborately and exhaustively examined both upon principle and authority. That case affirms the following propositions :

" The possession of such paper carries the title with it to the holder : ' The possession and title are one and inseparable.'

"The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. *That result can be produced only by bad faith on his part.*

"The burden of proof lies on the person who assails the right claimed by the party in possession.

"Such is the settled law of this court, and we feel no disposition to depart from it."

So, also, in *Swift vs. Smith*, 102 U. S., 442, this court (Mr. Justice STRONG giving the opinion) says, regarding the purchase of a negotiable note (p. 444):

"There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note, nor anything in the endorsement thereon, to notify him that it did not belong to Jackson, both legally and equitably. It was mercantile paper, and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. *Goodman v. Simonds*, 20 How. 343.) *He can lose his right only by* ACTUAL NOTICE OR BAD FAITH."

See, also, to the same effect, *Goetz v. Bank of Kansas City*, 119 U. S., 551, 560.

Even as respects non-negotiable property, like real estate, this court in *Wilson v. Wall*, 6 Wall., 83, treating of constructive notice, quotes with approval (p. 91) *Sugden on Vendors*, as follows:

"In *Ware v. Lord Egmont* the Lord Chancellor Cranworth expressed his entire concurrence in what, on

many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to effect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

Applying these principles to the present case, it is perfectly obvious that a person purchasing one of the bonds now in question, with its specific and positive recitals that these bonds are "issued by the said city of Santa Cruz for the purpose of refunding *the bonded indebtedness of said city*," is not guilty of "*bad faith*," "gross or culpable negligence," or of any negligence whatever, in not looking up all the records of said city before purchasing the bonds, or in believing and relying on the express recital made by the city in the bonds that what was refunded was "*the bonded indebtedness of said city.*"

Even if it were to be assumed and held that a purchaser of negotiable bonds without any recitals would have constructive notice of the ordinances, resolutions and notices of election and would be bound at his peril to examine the same before purchasing the bonds (and if this were held to be so in the absence of any statute which provides that such ordinances, resolutions, and notices of election shall be constructive

notice—a holding which we believe to be clearly erroneous), yet recitals in bonds constitute an estoppel, precisely on the same principle that an estoppel may and frequently does exist in respect to the title of real estate.

The statutes of most of the States provide for records of deeds and mortgages and other instruments of conveyance of land, and that such records shall be constructive notice to all subsequent purchasers. Nevertheless, the courts uniformly hold that a person may estop himself from relying upon the constructive notice which such records furnish.

This was held in a case in New York in regard to a municipal corporation. *Trustees, &c., of Town of Brookhaven vs. Smith*, 118 N. Y., 6. There the town had passed certain resolutions recognizing the title of the land in Smith, whereas the records showed that the title was not in Smith, and the Court of Appeals held that the town was estopped to assert or rely upon the record title. The court says (p. 641):

"The authorities in this state are all harmonious on the subject of estoppel *in pais*.

"When a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequence would be to work an injury to such third person or to some one claiming under him (*Wendell vs. Van Rensselaer*, 1 Johns. Ch., 344, 354; *Storrs vs. Barker*, 6 *id.*, 166; *Town vs. Needham*, 3 Paige, 545; *Dezell vs. Odell*, 3 Hill, 215; also see dissenting opinion of Judge BRONSON approved in 47 N. Y., 500; *Brown vs. Sprague*, 5 Denio, 545; *Plumb vs. Cattaraugus C. M. Ins. Co.*, 18 N. Y., 393; *Welland Canal Co. vs. Hathaway*, 8 Wend., 483; *Thompson vs. Blanchard*, 4 N. Y., 303; *Com'l Nat. Bk. vs. Nat. Bk. Commonwealth*, 50 *id.*, 575;

Armour vs. M. C. R. R. Co., 65 *id.*, 111–122; *N. Y Rubber Co. vs. Rothery*, 107 *id.*, 310–316).

"Numerous cases where this principle has been applied to real estate are collected in Washburn on Real Property (vol. 3, chap. 2, sec. 6), to which reference is made. When so applied it is as effectual as a deed would be from the party estopped.

"The general rule deduced from all the authorities is that if one is induced to purchase land by the acts or representations of another designed to influence his conduct, and creating a reasonable belief on his part under which he acts that he is thereby acquiring a valid title to the same, the party who thus influenced him is estopped from setting up his own title, existing at the time of the purchase, against that of the purchaser.

"The various declarations of the town through the trustees and town meetings must be construed as a single representation. They were all *in pari materia*, and had one purpose—viz., to inform Smith that the town made no claim to the land he desired to purchase."

To hold that the ordinances, resolutions and notices of election can be introduced as evidence to overthrow the estoppel produced by the recitals in the bonds is for the City to invoke and use the doctrine of constructive notice to perpetrate a fraud. But Courts never permit this doctrine to be invoked for any such purpose.

This is a principle that will forever stand in the way of any person, whether natural or artificial, retracting such representations as those made in these bonds. The question of fact as to whether the indebtedness which was being renewed by these refunding bonds *were valid bonds of the City was one peculiarly within the knowledge of defendant*. The purchaser of the bonds had no actual knowledge on the subject. He trusted to and relied upon these representations. The doctrine of the *Sutliff case*, as applied to any recitals in

those bonds is one thing (even if that case really has any great importance after the decisions in *Evansville vs. Dennett* and *Gunnison County vs. Rollins*, *supra*), but the application of it to overthrow the recitals in these bonds would be another matter. What were these recitals made for?

The City officers knew that these bonds would go on the market and would pass from hand to hand for value. They knew that these representations would give currency to the bonds. They knew they would reach the hands of men who would place their money in them as an investment. Now, to allow defendant to allege the falsity of these representations would be to allow it to perpetrate a frand—an *actual, willful and monstrous fraud*. This has never before been tolerated by a Court of justice. The doctrine of constructive notice can never be invoked as an aid to the perpetration of a willful fraud. It is a doctrine used to balance and adjust equities where no fraud is intended. Suppose a man has a deed on record, but, for the purpose of defrauding a third party, tells him that his grantor has a perfect title, and induces him to buy the property. Will the doctrine of constructive notice aid in the fulfillment of the fraud? Certainly not. But where is there any difference, in principle, between the case supposed and the case at bar? These representations were with reference to definite, specific facts. There is no pretense that a *mistake* was made. They were calculated to *deceive*. A man is presumed to intend the natural results of his acts. They were of such a character that if—as is now claimed—they were absolutely false, they must be pronounced wilfully

fraudulent. Let us see what the Courts have said upon this subject.

In *Converse vs. Blumrich*, 14 Mich., 109, the Court said:

"The laws of constructive notice can never be so applied as to relieve a party from responsibility for *actual misstatements and frauds.*"

In *Groton Savings Bank vs. Batty*, 30 N. J. Eq., 126, the Court said:

"The principle [that the possession of land is notice to others of the possessor's title] which the Lathrops invoke is intended for a shield to protect the equitable rights of those who are entitled to the consideration of equity. It will not be available as a *cover of fraud*, nor will it be applied against equity."

In *Wild vs. Gibson*, 1 H. L. Cas., 605, the Court said:

"Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of *direct personal fraud.*"

See, also, *Gill vs. Hardin*, 48 Ark., 412.

In *Stone vs. Covell*, 29 Mich., 359, the Court said:

"We have heretofore held that a man is bound by his positive and unequivocal assertions of fact, and bound to make good the consequences of their falsehood. And when he asserts as true what he has reason to believe false, and gives no qualification to show that he is not speaking positively and from knowledge, we think there is no sense or justice in exempting him from responsibility (*Converse vs. Blumrich*, 14 Mich., 109; *Beebe vs. Knapp*, 28 Mich., 53; *Beatty vs. Lord Ebury*, L. R., 7 H. L., 102)."

The principle of constructive notice is always resorted to in order to prevent the person having it from doing an act to the injury of another, and does not apply where the question is whether one was barred by

his assent to a *fraud practiced on him (Spencer vs. Spencer*, 3 Jones Eq., 404*)*.

The defendant in this case is pleading its *own fraud*. It is asking to be permitted to show that its positive statements of facts *were false*—not false by mistake, but *wilfully and solemnly false*. It does this upon the flimsy pretext that it had made another record, at another time, from which, if the purchaser of these bonds had examined it, he would have ascertained that this latter statement was false. Even if this conclusion, as to what the other record would show, were correct, we deny that the fraud can be evaded in that way. This other record could only give constructive notice, and that is inadequate to repel a positive fraud.

Back of these recitals was an order entered of record prescribing what the bond should recite (Record, p. 32, 36). Suppose there was some conflict between these records. Which was a purchaser entitled to believe? The recital was the later record. It was *specific and certain* as to the bonds being issued to refund "bonded indebtedness of said city." It related to a matter not only peculiarly within the knowledge of defendant, but one that it was its *duty* to investigate.

As to this question of fraud, it will not do to try to make a scapegoat of the City Counsel and plead the innocence of the people of this city. The people voted these bonds under a notice of election, specifying and describing the bonded indebtedness to be refunded. The procedure of the council was all entered of record. The whole transaction was open and public. During the period that these bonds, containing these recitals, were being issued, no taxpayer came forward and objected to their issuance or to the recitals they contained.

Public Policy Requires that the Negotiable Character of Municipal Bonds be Fully Maintained, and that the Defense Attempted in the Present Case Should be Held Bad.

The character of municipal bonds as negotiable securities has been well settled by scores of decisions in the Courts. As such negotiable securities, easily marketable, passing from hand to hand, they constitute a desirable and convenient investment for money. The importance of preserving to its fullest extent the negotiable character and standing of such securities is fully as great to the municipalities themselves as to the purchasers of such securities. It is their negotiability that is the chief element of their desirability as an investment, and that has resulted in the reduction of the interest on these securities to the present low rates. But once let it be understood among the investing community, who constitute the market for these municipal bonds, that such securities are not negotiable, but that a purchaser of them—it may be in the City of New York, or Boston, or Philadelphia, or Washington, or Chicago—must himself take a journey to Santa Cruz, California, and search out records that existed five, ten, twenty or even thirty years before his contemplated purchase of bonds, and inform himself in regard to all those records before he completes his purchase—we say once let this be understood, and the market for municipal securities is gone. We do not believe that this Court will give its assent to any such doctrine, or that it is going to hold that a notice of election or an ordinance of the city is constructive notice to all the world, affecting the city's negotiable

bonds, into whosesoever hands they may come, and also can be used as a defense against bonds in the face of the specific and solemn recitals therein contained. Such is not the doctrine of this Court. On the contrary, this Court has expressly stated and held in *Evansville vs. Dennett*, 161 U. S., 434, *supra* (p. 443):

"As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the City Counsel, whether those conditions had, in fact, been performed. **With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature.**"

So also, in *Marcy vs. Oswego Township*, 92 U. S., 637 (the leading case in respect of the effect of an *over-issue* of bonds where the limit is fixed by statute), the recital was as follows (p. 639):

"This bond is executed and issued by virtue of and in accordance with an act of the Legislature of said State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved Feb. 25, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said Township of Oswego, at a special election duly held on the seventeenth day of May, A. D. 1870."

The Court says that the bonds are valid:

"Unless they were voted and issued in excess of the amount authorized by the act. It became, therefore, a question whether in this suit, brought by a *bona fide* holder for value to recover the amount of some of the coupons, it could be shown, as a defence to a recovery, that at the time of voting and issuing the series of

bonds the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing the whole series, amounting to $100,000."

The Court held that such defense could not be made; and, on this point said (p. 641):

"So, also **the subsequent issue of the bonds containing the recital above quoted,** that they were issued 'by virtue of and in accordance with' the legislative act, and 'in pursuance of and in accordance with the vote of three-fifths of the legal voters of the township,' **was another determination not only of the result of the popular vote, but that all the facts existed which the statute required, in order to justify the issue of the bonds."**

Conclusion Under This Point.

In conclusion, under this Point, we respectfully submit to this court that the views which are stated by the Circuit Court of Appeals as the ground, and the *only* ground for its decision in the present case, namely, that the *bona fide* holder of a negotiable municipal bond, payable to bearer and transferable by delivery, is put upon notice of what is contained in the books of record of proceedings of the municipality issuing the bonds, would overturn the whole doctrine of negotiable municipal bonds. They would no longer be negotiable according to the law merchant; that is, transferable by delivery, and be protected in the hands of the purchaser against any equities and defenses not appearing upon their face, but they would, in substance and effect, be reduced to the quality of instruments non-negotiable according to the law merchant. Any such doctrine is, as we have shown in

this brief, directly contrary to the numerous decisions of this court, and especially to the decisions in the cases of *Hackett vs. Ottawa*, *Evansville vs. Dennett*, *Gunnison County vs. Rollins*, and the other cases referred to *(supra)*.

These bonds, as appears by the record in this case, had been voted for by the electors, issued by the city, executed and delivered by the city, and had passed into the hands of about a score of purchasers for value—savings banks, national banks, trust companies and other purchasers, and investors and lenders on negotiable paper—in the regular course of business. The decision of the Circuit Court of Appeals in the present case is to the effect that all these numerous holders of these bonds and coupons must lose their money because they did not each one, before lending any money on these negotiable bonds containing the recital that they were issued to refund bonded indebtedness of the city of Santa Cruz, make a journey across the continent and examine for themselves the records and books of the city of Santa Cruz—for what? For the purpose of finding evidence to contradict the express recital in the bonds that they are issued to "*refund the bonded indebtedness of said city.*" The impracticability, not to say anything of the gross injustice of any such doctrine, is obvious. It is not the doctrine of this court, and the decision of the Circuit Court of Appeals should be reversed.

II.

Inasmuch as the bonds in question have passed into the hands of bona fide holders for value, the fact that such bonds are negotiable and the general principles of law applicable to negotiable bonds prevent the city of Santa Cruz from setting up as a defense either (a) that the said bonds were issued in part for refunding water company bonds, which water company bonds had been assumed and agreed to be paid by the city, or (b) that it delivered the bonds on a sale upon credit, and without receiving cash payment therefor, or upon a sale not made in a manner prescribed by law. It is too late to raise any such defense after negotiable bonds have passed into the hands of bona fide purchasers.

That the *mere negotiability of the bonds* would cut off the defense that they were issued in part to refund the bonds of the water company, see *State of California vs. Wells, Fargo & Company*, 15 Cal., 336 (1860), quoted in this Brief, p. 68.

Purchaser of negotiable bonds in the market is not bound to inquire whether the maker received payment or other consideration therefor when the bonds were issued.

A person purchasing a negotiable municipal bond in the regular course of business, say from a dealer in

bonds in New York, or Chicago, or Boston, does not ask, nor is he required by law to ask, the vendor of the bond to wait, before the purchase is concluded, until the proposed purchaser can communicate with the maker of the bond and ascertain from the maker whether or not the maker received pay for the bond when it was issued, or until the proposed purchaser can himself take a journey, or send some representative of his on a journey, to the place where the bond was issued, and look up the records and make an investigation to ascertain whether or not the bond was paid for when it was issued. Such is not the actual practice as to the purchase of negotiable bonds or other negotiable instruments; nor does the law require any such procedure and inquiry by the proposed purchaser of a negotiable bond. On the contrary, the law is well settled, and this is a fundamental part of the law of negotiable paper, that when such paper has passed into the hands of a *bona fide* purchaser it is too late to raise any question that the maker thereof did not receive a consideration for its issuance.

The bonds in question in the present case were executed and delivered by the city. This is expressly found by the Court (Finding of Fact No. 11, Record, p. 23). The learned counsel for the city, however, claims that some of the conditions on which the statute authorizes such delivery were not complied with; such as a sale at not less than face value in gold coin and payment of the purchase price. If these conditions were not complied with, that fact does not negative a delivery of the bonds, and does not constitute any defense to the bonds. The delivery of the bonds was one distinct act, and the sale at par in gold and payment therefor, while required to be precedent or simultaneous acts,

were only conditions precedent, and, whether performed or not, did not change the fact of delivery.

It is well settled that municipal bonds payable to bearer and the coupons thereof, such as are the bonds and coupons in the present case, are negotiable instruments; that is, negotiable according to the law merchant. It is, of course, not necessary to cite to this Court the numerous decisions of the Supreme Court of the United States to this effect. This negotiability means something. It means that an instrument of this kind for the payment of money, payable to bearer, is intended to pass by delivery from hand to hand, and to give a good title thereto to the person who pays his money therefor without any notice of any illegality in respect thereof. The further effect of such negotiability is to cut off the maker from setting up any defense to such instruments, except that he did not make the instruments (in other words, what was known at common law as the plea of *non est factum*), and as respects municipal corporations this includes everything except the question whether there was power given in the Constitution or statute to issue such bonds. As respects such negotiable instruments, the maker thereof, whether the maker be a municipal corporation or an individual, cannot set up any defense such as that it or he did not receive payment for the bonds, or that the bonds were in fact issued for an unauthorized purpose, or that the proceeds of the said bonds were in fact appropriated in whole or in part to an unlawful purpose. When there is power given by statute to issue such negotiable instrument, and such instrument has been issued, and has passed into the hands of a *bona fide* holder for value, it is too late to set up any such defense. This results from the mere negotia-

bility of the bonds under the law merchant, as has been decided in numerous cases in the Supreme Court of the United States and in other courts.

The principles which apply as to negotiable instruments, where such instruments have come into the hands of *bona fide* holders, are well stated by Chief Justice BIGELOW in the case of *Fearing vs. Clark*, 16 Gray (Mass.), 74 (approved by the U. S. Supreme Court in the case in 170 U. S., 593, 604, next cited in this brief), where the court says :

"The defendant proved no facts at the trial which constituted a valid defense to the note declared on as against the plaintiff, who is a *bona fide* holder for value, without notice. The rule is well settled that, when a note is transferred by a party to whom it is entrusted without authority, or fraudulently, it will be valid as against the maker in the hands of a holder who takes it *bona fide* without notice of the special circumstances under which the note came into the possession of the payee or agent of the maker who puts it in circulation. In such case the maker or endorser who places it in the hands of another for the purpose of being used in a particular way or for a special object takes the risk of its being used in a different way, and cannot refuse to pay it to any *bona fide* holder into whose hands it may come (Chit. Bills (10th ed.), 198; *Sweetser vs. French*, 2 Cush., 309). It is undoubtedly true that, as between the original parties to a note, or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of *Putnam vs. Sullivan*, 4 Mass., 45, is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only, and it was held that a delivery by the clerk, whether through deception practiced on him or by a voluntary violation of the trust reposed in him, must be deemed

in law, as against a *bona fide* holder, a delivery by those who were liable on the notes. The rule is different in regard to a deed, bond or other instrument placed into the hands of a third person as an escrow, to be delivered on the happenings of a future event or contingency. In that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are intrusted by the makers, to fall on those who enabled them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value, without notice."

Another case in point is *Provident Life & Trust Company vs. Mercer County, 170 U. S.*, 593.* The facts in that case were that the County of Mercer, Kentucky, had subscribed for stock and voted bonds in aid of the construction of the Louisville Southern Railroad. The statute which authorized the issue of the bonds provided (p. 594):

SEC. 4. The said bonds shall not be binding and valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds *shall be deposited with a trustee or trust company,*

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*This decision reversed *Mercer County vs. Provident, &c., Trust Co.*, 43 U. S. App. 21, which last mentioned decision was cited as authority by the learned counsel for the city of Santa Cruz in their brief in the present case in the United States Circuit Court of Appeals.

to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: Provided, however, that such trust company or trustee shall, before receiving such bonds, give bond with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: *And provided, further,* that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The bonds in question in that case were deposited with a trustee, as provided by said section 4. Afterwards the said trustee delivered the bonds to the railroad company. The county made default in the payment of the interest on the bonds. The Provident Life and Trust Company, a *bona fide* purchaser of certain of said bonds, brought an action for interest thereon. The defense set up by the county was that the bonds had been delivered by the trustee contrary to the terms of section 4 of the statute above quoted, in that the railroad company had not constructed its road so as to entitle it to the delivery of the bonds at the time such delivery was made by the trustee. This defense was held good by the United States Circuit Court of Appeals for the Sixth Circuit, but the Supreme Court of the United States reversed this judgment. Mr. Justice BREWER, giving the opinion of the Supreme Court, says (p. 604):

"But if the true, the only permissible, construction be otherwise, and the demand of the statute is that the road be actually constructed from the north to the south line of the county, and so constructed that a train of cars shall have passed over it, then the question arises as to the effect of the decision of the trustee that the condition had been complied with, and of his delivery of the bonds, and their subsequent purchase by a *bona fide* holder. It is said that the bonds were placed in escrow, and that when an instrument is so

placed there can be no valid delivery until the condition of the escrow has been performed, and without performance the instrument passes out of the hands of the one holding it in escrow it is not enforcible against the maker, and that in a suit on the instrument the inquiry is always open whether the condition of the escrow has been performed. Whatever may be the rule in case the instrument so placed in escrow be a deed or non-negotiable contract, we are of opinion that a different rule obtains when the instrument is a negotiable obligation.

" 'It is generally agreed that a delivery of negotiable paper left in escrow, contrary to the terms upon which it was to have been delivered, will pass a good title to the *bona-fide* transferee for value and before maturity.'

" *Long Island Loan and Trust Co. v. Columbus etc. Railway*, 65 Fed. Rep., 455, 458.

" In *Fearing v. Clark*, 16 Gray, 74, 76, Chief Justice BIGELOW thus states the law :

" 'The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are entrusted by the makers, to fall on those who enable them to hold themselves out as owners of the paper *jure disponendi*, and not on the innocent holders who have taken it for value without notice.'

" In *Burson v. Huntington*, 21 Michigan, 415, 433, it is said :

" ' If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, * * * and the person to whom it is thus intrusted violate the confidence reposed in him ; and put the note into circulation ; this, though not a valid delivery as to the original parties, must, as between a

bona fide holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder.'

"See also *Vallett v. Parker*, 6 Wend. 615, 620; *Chase National Bank v. Faurot*, 149 N. Y. 532; *Graff v. Logue*, 61 Iowa, 704.

"Within these authorities it must be held that when the trustee adjudged that the condition had been complied with and delivered the bonds the railroad company took such a title as transferred to a *bona fide* holder, enabled him to recover against the county, notwithstanding the condition had in fact not been performed. That the trustee was the agent of the county and responsible to it for the manner in which he discharged this duty is obvious from the provision in the statute that he shall give 'bond, with good surety, approved by the county judge, for the faithful performance' of his duty. If, in case the condition was not performed, the county had a perfect defense to the bonds, even in the hands of a *bona fide* holder, there were little need of requiring the trustee to give any security."

It was objected in the case of *Provident Life & Trust Company vs. Mercer County*, 170 U. S., 593, just as it was objected by the learned counsel for the City of Santa Cruz, in the present case in the Circuit Court of Appeals, that recitals in bonds cannot operate as to a fact occurring after the signing of the bonds and before delivery, the learned counsel citing therefor the reversed decision of *Mercer County vs. Provident Trust Company*, 43 U. S., App., 21. In the Supreme Court of the United States, in *Provident Life & Trust Company vs. Mercer County*, 170 U. S., 593, Mr. Justice BREWER, giving the opinion of the Court, says (p. 601):

"But it is said that the recitals in this case can be be held conclusive only as to matters transpiring before the placing of the bonds in the hands of the trustee, such as the election, etc., because by section 4 of the statute the bonds, when executed, were to be de-

posited with a trustee, to be held in escrow and delivered only upon the performance of a certain condition—a condition to be performed subsequently to the execution of the bonds. Assuming, without deciding, that such limitation must be placed upon the recitals, we pass to inquire whether that condition was in fact performed, and, if not, whether after delivery by the trustee the county can be permitted to raise the question as against *bona fide* holders."

The Court then held, as above stated, that the mere fact that bonds were negotiable, without any reference to the recitals in the bonds, was sufficient to prevent the county from raising any defense, as against *bona fide* holders, that the bonds had been delivered without compliance with the provisions of the statute as to conditions upon which delivery was to be made.

If it were necessary, an argument might well be made to the effect that the recitals in the bonds, such as the recitals in the bonds in the present case (Record, p. 5), to wit:

That this bond is

"issued * * * under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California," &c.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law."

would estop the defendant from showing that when the bonds were delivered the provisions of the statute had not been complied with as to sale. This question as to the effect of recitals was not decided by this Court in the case of *Provident Life & Trust Company vs. Mercer County*, because it was not necessary to decide it, the mere negotiability of the bonds,

on general principles, being enough to prevent the defendant raising any such defense. But obviously this recital was put into the bond to take effect as a part of the bond when it should pass into the hands of purchasers and holders thereof. There is no reason in principle why such a recital might not be prepared beforehand and inserted in the bond to take effect as a recital when the bond is delivered, and to cover all matters down to and including the time of the delivery of the bond. This is done every day in deeds, and there is no reason why the same thing may not be done as respects a bond. The mere fact that the bond is actually prepared and signed before it is delivered need not prevent the municipality from preparing and inserting in the bond recitals which are intended to be good, and will be good, *as of the time when the bond is delivered.*

But however this argument as to recitals may be regarded, it is, as stated by the Supreme Court in *Provident Life & Trust Company vs. Mercer County*, 170 U. S., 593, 601, not at all necessary to consider such recitals, but the mere fact that the bonds are negotiable is enough to prevent any such defense as that the bonds were not sold in accordance with the provisions contained in the statute authorizing them.

In *Mercer County vs. Hacket*, 1 Wall., 83, the statute provided that the bonds should not be sold (p. 83) "at less than the par value thereof." On the trial, the county proposed to prove (p. 85)

"'that the bonds issued were paid out by the railroad company to contractors at about sixty-six and two-third cents on the dollar; all this for the purpose of showing that the bonds were procured from the County of Mercer by misrepresentation and fraud, and were not binding upon her, and, after being thus

obtained, were disposed of at less than their par value, *in violation of the provisions of the act authorizing the county to subscribe and issue bonds;* and also for the purpose of showing want and failure of consideration.

"The court below refused to let such evidence be given," &c.

The Supreme Court affirmed the judgment, saying (p. 96):

"In the case of *Woods vs. Lawrence County*, 1 Black, 386, as a corollary from the principles stated, we have decided that, in a suit brought on the coupons of these bonds by a *bona fide* holder, his right to recover is not affected by the fact that the railroad company sold the bonds at a discount, contrary to the provisions of their charter, which forbids the sale of them at less than their par value."

III.

The Circuit Court and the Circuit Court of Appeals erred in holding that ordinances numbered 314 and 315 showed or gave notice on their face that the $89,000 bonds issued by the Water Company were not part of the bonded indebtedness of the City of Santa Cruz. The city of Santa Cruz had purchased the plant of the water company subject to the mortgage securing the said bonds, and also assuming and agreeing to pay the said bonds, and therefore the city of Santa Cruz had these bonds as "an outstanding indebtedness evidenced by bonds" within the meaning of the act of March 1, 1893 (Stat. 1893, p. 59, quoted

ante pp. 3–5), authorizing the issue of refunding bonds.

History of Acquisition of Water Works Plant by City.

The facts as to the water-works property in Santa Cruz appear in the findings and record. The court finds (Record, p. 26) that Ordinance Number 314 was passed, which recites, among other things, that $89,000 first mortgage bonds of the water company, secured by mortgage, were outstanding, and concludes thus (Record, p. 26):

"which said bonds outstanding were, at the time of the conveyance by the City Water Company, of Santa Cruz, to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon the said property known as the city water works, and became thereby *a part of the bonded indebtedness of the city of Santa Cruz.*"

The conveyance thus referred to is set out at length in the Bill of Exceptions (Record, pp. 176–185), which conveyance is dated March 29, 1892, and was duly recorded. This conveyance recites (Record, pp. 176, 177) that on the 16th of September, 1889, the city of Santa Cruz entered into a contract with Coffin & Stanton, which contract is set out in the said conveyance *in extenso*. Said contract recites, among other things (Record, p. 177), that

"WHEREAS, the city of Santa Cruz desires to acquire a water-works system for said city;
AND, WHEREAS, Coffin & Stanton desire to furnish such a water-works system;" etc.

Said contract then proceeds to grant to Coffin & Stanton a franchise to construct a water-works system

in conformity with the specifications of the city engineer, embodied in his report of July 30, 1889. Said contract also provides that Coffin & Stanton shall organize a water company and assign said c ntract and franchise to such company. Said contract then contains this covenant (p. 177):

"And said city of Santa Cruz agrees to purchase said water works when the same are completed, and to pay for the same the sum of three hundred and twenty thousand dollars, as hereinafter set forth."

The contract then stipulates that the water company may make a mortgage on its plant, and contains a provision for the application of any payments which the city shall make to the extinguishment and cancellation of the mortgage bonds. Then follows this covenant (p. 178):

"And when said water company shall have fully completed said water works, then said water company shall convey absolutely to said city of Santa Cruz, all its property, rights, titles, and franchises, to have and to hold forever subject only to the mortgage and to the deed of trust or escrow, hereinbefore mentioned."

The deed of conveyance of the water plant to the city further recites (p. 184):

"AND, WHEREAS, the said system of water works has been fully completed to the satisfaction of the party of the second part [the city of Santa Cruz], and said water works have been accepted by it:

"Now, therefore, the party of the first part, in consideration of the premises and of the sum of one dollar," etc.

Then the said deed grants and conveys the said water-works plant to the said city in due form, with *habendum*, as follows (p. 184):

"TO HAVE AND TO HOLD the same and every part thereof unto the said party of second part, its success-

ors and assigns, subject, however, to said mortgage or deed of trust, and all the obligations thereby imposed, which bonds, mortgage or deed of trust, and obligations, the party of the second part agrees to pay and perform."

It thus appears that the water-works plant was, in equity, the property of the city from the beginning, the city from the beginning having the right to acquire it, as it did on the payment of the stipulated purchase price. The water company was, by virtue of these stipulations, its contractor or trustee for the purpose of constructing for the city the water-works plant, and agreed to convey it to the city on payment of the stipulated price. The conveyance was accordingly made, and contains the covenant on the part of the city, as part of the purchase price of the property, to pay the $89,000 remaining unpaid upon the mortgage, which, with the consent of the city, the contractor had made to raise the money to construct the works.

Our proposition is that the said ordinances, Numbers 314 and 315, did not show, or give notice, on their face, that the said $89,000 bonds of the water company thus assumed and agreed to be paid by the city were not bonded indebtedness of the city of Santa Cruz within the meaning of the refunding act of March 1, 1893, which authorized the refunding of bonded indebtedness of the city.

Section 1 of the Statute of California authorizing the issue of refunding bonds provides:

"Whenever any incorporated city or town other than cities of the first-class in this State has an outstanding indebtedness evidenced by bonds and warrants thereof, the common council, board of trustees or other governing body thereof shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness," &c.

City, as purchaser of Water Works Plant, having assumed and agreed to pay, as part of purchase price, the Water Company mortgage and bonds, became primarily liable to pay such bonds, and they became part of the bonded indebtedness of the city.

The proposition which we here state is that, inasmuch as the City of Santa Cruz purchased the water company's plant subject to the mortgage made by the water company, and assumed and expressely agreed to pay the said water company's bonds, the city of Santa Cruz thereby became indebted for and bound to pay the said bonds, the city thus becoming the principal debtor upon the said bonds. The deed of conveyance from the water company to the city expressly provides as follows (Record, p. 184) :

" Subject, however, to said mortgage or deed of trust and all the obligations thereby imposed, which bonds, mortgage or deed of trust and obligations the party of the second part [the city of Santa Cruz] agrees to pay and perform."

This deed was received and accepted by the city, and filed for record by the city clerk (Record, p. 185),

We submit that on these facts it is clear, within the numerous decisions of the State of California, that the city of Santa Cruz became primarily liable for the payment of the bonds of the water company.

In the case of *Williams vs. Naftzger*, 103 Cal., 438, the court says (p. 440) :

" An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable therefor to the mortgagee, and in an action for the foreclosure of the mortgage, if the mortgaged

premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety (*Halsey vs. Reed*, 9 Paige, 452; *Crowell vs. Currier*, 27 N. J. Eq., 154; *Crawford vs. Edwards*, 33 Mich., 354; *Keller vs. Ashford*, 133 U. S., 622; *Biddel vs. Brizzolara*, 64 Cal., 354; Jones on Mortgages, secs. 741, 752)."

That the grantee in such a case becomes primarily liable to pay the debt see, also, *Roberts vs. Fitzallen*, 120 Cal., 482; *Tuohy vs. Woods*, 122 Cal., 665.

So, also, in the case of *Alvord vs. Spring Valley Gold Company*, 106 Cal., 547, a California corporation had taken a deed executed by another corporation subject to indebtedness of the grantor corporation secured by a certain mortgage therein mentioned. The court says (p. 552):

"The deed referred to contains an unequivocal recognition of the mortgage in question as a valid and subsisting obligation and lien on the property, and a promise to pay it as a part of the consideration for the conveyance. It is settled by an almost unanimous line of decisions in this country, approved by all text writers, that such a recital in a deed, even when the deed is not executed by the grantee, is conclusive evidence in favor of the mortgagee and against the grantee in the deed of the existence and validity of the mortgage."

In *Weaver vs. McKay*, 108 Cal., 546, a conveyance was made subject to a certain mortgage which the grantees therein assumed and agreed to pay. The court held that the grantees thereby assumed payment

of the mortgage debt, and became liable to pay judgment for deficiency if the land did not sell for enough to pay the debt.

In *Hopkins vs. Warner*, 109 Cal., 133, the court says (p. 136):

"By the purchase of the mortgaged premises, and the agreement on the part of the purchaser to discharge the mortgage debt, there results, as between the mortgagor and his grantee, a substitution of the liability to the mortgagee, by which the grantee becomes the principal debtor to the mortgagee, and the liability of the mortgagor merely that of a surety for his grantee. This agreement of the grantee to discharge the mortgage debt is an obligation in the hands of the mortgagor, which the mortgagee may enforce for his own benefit when he seeks to obtain satisfaction of the mortgage debt, to the same extent that it could be enforced by the mortgagor."

So, also, in *Tulare County Bank vs. Madden*, 109 Cal., 312, the deed of conveyance recited a mortgage, and that the second party "assumes and agrees to pay the said amount due thereon." The court held that *the grantee was liable on the mortgage as the principal debtor, and that a deficiency judgment was properly rendered against him* on the foreclosure of the mortgage.

To the same effect see *Keller vs. Ashford*, 133 U. S., 610.

See, also, on this point JONES on *Mortgages*, 5th edition, section 749 *et seq.*

In order that the grantee may be personally liable to pay the mortgage debt, it is not necessary that he should sign the deed or any obligation.

JONES on *Mortgages*, section 752, states this matter as follows:

"To create a liability on the part of the grantee to pay an existing mortgage, it is not necessary that he should sign the deed or any obligation; his acceptance of a deed imposing this obligation upon him is all that is necessary."

See also on this point the several California cases above quoted.

For these reasons we say that the bonds and mortgage of the water company, thus assumed and agreed to be paid by the city, did in fact and in law constitute "an indebtedness of the city evidenced by bonds thereof" within the meaning of the refunding statute.

Let us consider the position taken by the city as respects this alleged defense to the refunding bonds. The proposition of the city is that any purchaser of the refunding bonds, if he had examined the ordinance calling the election and the notice of election, would have seen on the face thereof that the city was refunding these bonds of the water company which the city had expressly assumed and agreed to pay, which fact of assumption and agreement to pay is stated upon the face of the said ordinance and notice of election. The ordinance, No. 314, calling the election refers to these water bonds as follows (Additional Finding, No. 1, Record, p. 26):

"Which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz."

Consider what impression and information this statement would give to a proposed purchaser of the refunding bonds if he had examined such ordinance and notice of election. It seems to us clear that any one reading this statement in the ordinance, be he layman or lawyer, would come to precisely the same conclusion regarding the matter as the Supreme Court of California, as stated in the numerous cases above quoted, namely, that the city of Santa Cruz became thereby primarily indebted to pay the bonds of the water company. This is the fair, practical and common sense view of the matter. It is a view which deals with the substance and real legal effect of the transaction, whereas the view taken by the city is one which can only be adopted, if at all, by raising and finding an artificial distinction and not looking at the real substance of the matter.

Bear in mind, moreover, that this is a defense which is sought to be raised against the *bona fide* purchaser of the refunding bonds. As we have shown in our argument, Point I., *supra*, p. 92, the question whether a *bona fide* purchaser is to be held affected with notice of any illegality is to be determined by an examination of the question whether such *bona fide* purchaser was guilty of bad faith in making his purchase. Applying this test in the present case, it is perfectly obvious that no proposed purchaser of the refunding bonds would be guilty of bad faith in purchasing the said bonds, even if he had seen or read the ordinance and notice of election authorizing the same. This ordinance would have informed him that the city was issuing these refunding bonds to refund in part bonds issued by the water company, but it would also have informed him that these bonds had, by the con-

veyance of the property by the Water Company, subject to the mortgage, the city agreeing to pay the bonds, become in law and in fact a part of the bonded indebtedness of the city.

The question whether these water bonds of the city of Santa Cruz had become a part of the bonded indebtedness of the city was a question which the city council must necessarily determine before issuing the bonds. They made and set forth in the ordinance calling the election their finding that the said bonds had "become thereby a part of the bonded indebtedness of the city of Santa Cruz." This was sanctioned by the vote of the qualified electors. This finding of the council was in itself a decision by the tribunal appointed by the refunding act to pass upon the question of issuing the refunding bonds. This decision involved a mixed question of law and fact, and the decision of this appointed tribunal is, under the numerous decisions of the Supreme Court of the United States, conclusive as respects the holder of the refunding bonds. Any other conclusion would involve the proposition that whenever indebtedness is refunded the proposed purchaser of the refunding bonds must go back and trace the indebtedness to its beginning and ascertain at its peril whether the said indebtedness is in all respects valid.

There is no specific finding by the court that the deed of conveyance was executed and delivered; but that fact is necessarily implied in the findings that were made. The court does find (Additional Finding of Fact No. 1, Record, p. 26, and Finding of Fact No. 5, Record, p. 19) that the city council passed Ordinance No. 314. The said Ordinance No. 314 expressly recited as follows, with re-

spect to the $89,000 bonds issued by the City Water Company of Santa Cruz :

" Said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz."

In other words, the court finds that the city council of Santa Cruz, in this Ordinance No. 314, expressly declares that at the time of the conveyance of the water company's property to the city these $89,000 of bonds became thereby a part of the bonded indebtedness of the city of Santa Cruz. Furthermore, here is a distinct recital and statement by the city council of the City of Santa Cruz, in this ordinance, calling the election authorizing the issue of refunding bonds, that these $89,000 bonds have become, *by the said conveyance* of the water company's property to the city subject to the mortgage securing said bonds, a part of the bonded indebtedness of the city of Santa Cruz. These bonds became indebtedness of the city of Santa Cruz, as above stated, by the deed of conveyance expressly providing that the City of Santa Cruz, the grantee therein, should assume and pay the said bonds.

Therefore, both the Circuit Court and the Circuit Court of Appeals erred in holding that the said Ordinance No. 314, and the said Ordinance No. 315 (Record, p. 33), showed that the said $89,000 bonds originally issued by the water company were not bonded indebtedness of the City of Santa Cruz. On the contrary, the express recital of the said Ordinance No. 314 is that those bonds were "a part of the bonded indebtedness of the city of Santa Cruz." How they

became a part of such bonded indebtedness may not have been fully stated in the said Ordinances Numbers 314 and 315, but the ultimate fact, depending partly on law and partly on facts, was expressly stated in the said ordinances.

In order to negative notice of illegality to any purchaser of refunding bonds who read Ordinances 314 and 315, it is enough that the $89,000 water company bonds might, under any conceivable circumtances whatever have become part of the bonded indebtedness of the city, and it is not necessary to show, either by findings of fact or otherwise, that such bonds actually did become part of the bonded indebtedness of the city.

In view of this express statement of the ultimate fact, the following proposition must be true in order that any such defense as that these $89,000 bonds were not a part of the bonded indebtedness of the City of Santa Cruz may be made, even as against any person who had actual notice of the said Ordinances Numbers 314 and 315—namely : It must appear from an inspection of the said ordinances that not only as a matter of fact these $89,000 bonds had not become a part of the bonded indebtedness of the City of Santa Cruz, but also that, as a matter of law, they could not have become a part of the bonded indebtedness of the said city. The burden is not upon the holder of these refunding bonds to show, by some express finding of fact of the court, that these old bonds had become a part of the bonded indebtedness of the City of Santa

Cruz. That fact is sufficiently established by the express recital thereof in the said ordinances. Note that what is claimed by the learned counsel for the city is that these Ordinances Numbers 314 and 315 on their face give notice to any person who actually reads them that these $89,000 bonds are not a part of the bonded indebtedness of the City of Santa Cruz. They clearly do not give such notice, unless the said $89,000 of water company bonds could not, under any state of facts and circumstances whatever, have become a part of the bonded indebtedness of the City of Santa Cruz. It is not necessary for the holders of these refunding bonds, even if they had notice of such Ordinances Numbers 314 and 315, to prove and have a finding of facts and circumstances which did make those $89,000 bonds of the water company part of the bonded indebtedness of the City of Santa Cruz. It is enough, *so far as negativing any notice of illegality in refunding said bonds is concerned*, that such facts and circumstances *might* have existed, and it matters not whether or not they did in fact exist.

The theory advanced by the learned counsel for the city of Santa Cruz, that anyone reading ordinances 314 and 315, would have noticed that these $89,000 bonds were bonds of the water company, and, therefore, could not be refunded, is contrary to the well-settled canons of construction in that their theory wholly disregards and holds meaningless the other language contained in the said ordinances 314 and 315 in the very same sentence in which the said $89,000 bonds are mentioned, which other language expressly states that these bonds are secured by a mortgage on the water company's plant, and that the same has been conveyed to the city, subject to the said mortgage, and

that said $89,000 bonds have become "a part of the bonded indebtedness of the city of Santa Cruz." If any one had read the said ordinances 314 and 315, and if on such reading he had noticed that these $89,000 bonds were issued by the water company, and if he would then have received the impression that these were not bonded indebtedness of the city, he would immediately, in the same sentence, have been informed how and why these bonds had become part of the bonded indebtedness of the city, and would thus have been distinctly reassured on this point. Furthermore, this reassurance was given to him not only by the city council of the city of Santa Cruz, the body chosen expressly to represent the people of the city, but he would also have been reassured by the practically unanimous vote of the qualified voters of the city of Santa Cruz, who, after the notice of election, had expressly and specifically informed them that these $89,000 water company bonds were to be refunded by the issue of the bonds now in question, voted overwhelmingly in favor of the refunding of these very $89,000 water company bonds.

We are now dealing with the question of what notice of illegality, if any, is conveyed by the said Ordinances Numbers 314 and 315, and our proposition is that if, under any facts or circumstances which might have existed (whether they actually existed or not is immaterial), the said $89,000 bonds of the water company could have become a part of the bonded indebtedness of the City of Santa Cruz, then no notice of illegality in refunding said $89,000 of bonds would have been conveyed to any person who actually read the said Ordinances Numbers 314 and 315.

It is well-settled law in California and elsewhere

that any person who takes a deed of conveyance subject to a mortgage, and agreeing to assume and pay a bond or other obligation secured by the said mortgage, thereby becomes liable, and primarily liable, to pay such bond or other obligation. The authorities on this point in the Supreme Court of the State of California are numerous.

See Cases on this Brief, *supra*, pp. 118-120.

The City had Power to Purchase Water Works.

But it may be objected by the learned counsel for the City of Santa Cruz that the City of Santa Cruz had no power or authority to purchase the said water works subject to the mortgage securing the said $89,000 of bonds, and agreeing to pay the said bonds. Such, we submit, is not the law in California. The said act of March 15, 1887 (Session Laws of California, 1887, p. 120), under which certain water-works bonds were issued, and under which, also, the city acquired its water works, expressly authorizes "the acquisition, construction or completion of any permanent municipal building, work, sewer, property, water rights, bridges or improvement, the cost of which is too great to be paid for out of the ordinary annual income and revenue of the municipality." [This Act is reprinted in the Appendix to this brief, *post*, p 304.]. There was, therefore, in the present case, express power, conferred by law upon the City of Santa Cruz, to purchase the said water works. This was general power to purchase, and there was no prohibition upon the city's purchasing water works subject to an existing mortgage thereon, or assuming and agreeing to pay such mortgage.

But it may be argued by the learned counsel for the city that the constitution of the State of California prohibited the City of Santa Cruz from purchasing these water works subject to the said mortgage, and assuming to pay the said $89,000 of bonds. An examination of Article XI., Section 18, of the constitution, however, shows that this is not the fact. In order to incur such indebtedness it would only be necessary to have a vote of the qualified electors, and to make provision for an annual tax to pay the interest and a sinking fund to pay the principal. For aught that appears on the face of the said Ordinances Numbers 314 and 315, all of these provisions might have been complied with as respects the said $89,000 of bonds assumed and agreed to be paid by the City of Santa Cruz. The said ordinances, therefore, did not on their face convey any notice to a person actually reading them that the voters of the city had not voted in favor of purchasing the property subject to the mortgage, and assumed to pay the said bonds, and made provision for a tax for interest and sinking fund.

It may possibly be further objected by the learned counsel for the City of Santa Cruz that the said act of March 15, 1887, contemplates that the cost of any public improvement acquired thereunder shall be paid by the issuance of bonds of the city. This fact, however, would not necessarily prevent the city from purchasing the water works subject to the said mortgage and assuming to pay the said $89,000 water company bonds. The said act of March 15, 1887, provides for and authorizes the submission to the qualified voters of a municipality of the "proposition of incurring a debt for the purpose set forth in the ordinance." Under this act of March 15, 1887, therefore, the city council

of the City of Santa Cruz may have passed an ordinance describing the proposed purchase of the water works by the city from the water company, and might have included, as a part of such proposed purchase, the taking of the property subject to the mortgage made by the water company and assuming to pay the said $89,000 of bonds, and providing for the payment of such bonds either by the levying of a tax or the issuing of new bonds under the said act of March 15, 1887. All of this may have been done in respect of these $89,000 of bonds of the water company, which the said Ordinances Numbers 314 and 315 expressly recited became a part of the bonded indebtedness of the City of Santa Cruz. Therefore, any person reading these Ordinances Numbers 314 and 315 would not have had any notice from the face of said ordinances that this proposition for the purchase of the water company's plant subject to the mortgage, the city assuming and agreeing to pay the said $89,000 of bonds, had not been fully submitted to the electors under the said act of March 15, 1887—*i. e.*, would *not* have had notice that the facts recited in the bonds were not true.

Both the Circuit Court and the Circuit Court of Appeals, therefore, erred in holding that any person merely by reading the said Ordinances Numbers 314 and 315, would have notice, both as a matter of law and as a matter of fact, that the said $89,000 bonds of the water company, which the said ordinances state had become "a part of the bonded indebtedness of the city of Santa Cruz," had not become a part of the bonded indebtedness of the city of Santa Cruz. Not only is it consistent with what appears on the face of the said ordinances, that they had become a part of

such bonded indebtedness of the city of Santa Cruz, but there is the express recital and statement that they have become a part of such indebtedness.

Not only so, but the refunding bonds themselves recite that "this bond is one of a series of bonds of like date, tenor and effect issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of the said city." That is to say, the refunding bonds themselves recite that all of the indebtedness which these refunding bonds are issued to refund was "the bonded indebtedness of the said city," which is the precise language of the enabling act.

Of course the holders of these refunding bonds, even if they had seen the said Ordinances Numbers 314 and 315, would not have been bound to go outside of the said ordinances and examine all the facts *in pais* to see whether or not the said $89,000 bonds issued by the water company had become a part of the bonded indebtedness of the city of Santa Cruz. It was *bonded* indebtedness, and it might have become a part of the bonded indebtedness of the *city*, and not only so, but it was expressly stated that it had become a part of the bonded indebtedness. There is nothing in the said ordinances, in respect of these $89,000 of bonds, to create any suspicion on the part of any person proposing to purchase the refunding bonds. It is an ordinary occurrence for property to be purchased subject to a mortgage, the purchaser expressly assuming and agreeing to pay the obligation secured by such mortgage. There was nothing to indicate that the statement as respects these bonds in the said Ordinances Numbers 314 and 315 was at all improbable or unlikely. On the contrary, the purchase of the property and the assumption of these bonds by the city was not only a

possible, but a very probable, occurrence, and one not calculated to arouse any suspicion.

Must be Actual Notice or Bad Faith in Order to Defeat Plaintiff's Recovery.

Where it is sought to affect the bona fide purchaser for value of commercial paper with constructive notice, the question is not whether there were grounds of suspicion, or even gross negligence on his part, but the question is whether he has acted in bad faith.

In *Murray vs. Lardner*, 2 Wall., 110, Murray had loaned money on some coupon bonds payable to bearer, to a person whom he did not know, and under circumstances which might, perhaps, have excited suspicion as to the title of such person to the bonds. The court in its charge submitted to the jury (p. 113):

"Whether there were such circumstances of the character which I have described to you as would warrant the inference that there was ground of suspicion, and that he should have made further inquiry as to the character of the paper."

The Supreme Court of the United States held that this was error and reversed the judgment. The court (Mr. Justice SWAYNE delivering the opinion), in reviewing the English cases and preceding cases in this court, says (p. 121):

"In *Goodman vs. Simonds*, 20 Howard, 343, the subject was elaborately and exhaustively examined both upon principle and authority. That case affirms the following propositions:

"The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.'

"The party who takes it before due for a valuable consideration without knowledge of any defect of title and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. *That result can be produced only by bad faith on his part.*

"The burden of proof lies on the person who assails the right claimed by the party in possession.

"Such is the settled law of this court, and we feel no disposition to depart from it."

So, also, in *Swift vs. Smith*, 102 U. S., 442, this court (Mr. Justice STRONG, giving the opinion), says, regarding the purchase of a negotiable note (p. 444):

"There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note nor anything in the indorsement thereon to notify him that it did not belong to Jackson, both legally and equitably. It was mercantile paper and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it, had no interest in it or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts (*Goodman vs. Simonds*, 20 How., 343). *He can lose his right only by* ACTUAL NOTICE OR BAD FAITH."

See, also, to the same effect *Goetz vs. Bank of Kansas City*, 119 U. S., 551, 560.

Even as respects non-negotiable property, like real estate, this Court, in *Wilson vs. Wall*, 6 Wall., 83, treating of constructive notice, quotes with approval (p. 91) *Sugden on Vendors*, as follows:

"In *Ware vs. Lord Egmont*, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges

of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the Court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

Further, as to constructive notice, see said case of *Ware vs. Lord Egmont*, quoted *infra*, pp. 299, 300.

No "Bad Faith" on Part of Purchaser of Refunding Bonds, Even if He Had Purchased After Reading Ordinances 314 and 315.

Applying these principles to the present case, it is obvious that even if any holder of these bonds had read the ordinances, numbers 314 and 315, and had seen there that the city of Santa Cruz was issuing bonds to refund $89,000 bonds of the water company, secured by mortgage on the property conveyed to the city accompanied by the express recital in said ordinances that "said bonds outstanding were, at the time of the conveyance by the city water company of Santa Cruz, to the city of Santa Cruz, of the property known as the City Water Works, and now are, a valid lien and charge upon the said property known as the city water works, and became thereby a part of the *bonded indebtedness of the city of Santa Cruz*," any purchaser of these refunding bonds in the market, we say, reading the said ordinances, numbers 314 and 315,

containing such provisions, would not have been guilty of any "*bad faith*" or of "*gross negligence*" in accepting the statement of the City Council in the said ordinances that the said $89,000 bonds issued by the water company had become part of the "bonded indebtedness" of the city of Santa Cruz. Not only would such purchaser not have been guilty of any "bad faith," but he would not have had any reason to suspect that this statement that these $89,000 of bonds of the water company had become part of the bonded indebtedness of the city of Santa Cruz was in the least untrue, nor would he have been guilty of any negligence, much less gross negligence, in not investigating further after he had seen this express statement and assurance made by the city council of Santa Cruz of this very fact, namely, that such indebtedness had "*become a part of the bonded indebtedness of the city of Santa Cruz.*" It was on its face a very natural and probable fact, consistent with every-day experience, that a city should buy a water company's plant subject to an existing mortgage, and assume and agree to pay the same.

We say, therefore, that any one reading said ordinances 314 and 315 would not have received any notice, actual or constructive, of any illegality in the issuance of the said refunding bonds from the fact that said ordinances recite that the bonds are issued in part to refund $89,000 bonds of the water company, which had become part of the bonded indebtedness of the city of Santa Cruz. And especially would he not have received any notice that the recitals in the refunding bonds were not true.

For these reasons we submit that, even if this court shall be of opinion that the holder of the refunding bonds had constructive notice of the ordinance calling the election, and also of the notice of election, which, however, we respectfully submit and show, under point I. of this brief, is contrary to the numerous decisions of the Supreme Court of the United States, yet the holder of such refunding bonds, if he had read such ordinance and notice of election, would not have received notice of any illegality in the issue of the bonds, and would not have been guilty of any fraud or bad faith in taking the refunding bonds. On the contrary, he would have been informed and assured by the solemn recital contained in the bonds and also made by the city council of Santa Cruz that the water bonds had "become a part of the bonded indebtedness of the city of Santa Cruz." Even under this view, therefore, the holder of these refunding bonds is entitled to recover in this action.

City Bound by its Construction of the Enabling Act, Concurred in by its City Council and its Qualified Voters.

Even if there could on any theory be any fair doubt as to whether or not the said refunding act of March 1, 1893, authorized the refunding of the $89,000 bonds of the water company which had been assumed and agreed to be paid by the City of Santa Cruz, and had thus become a part of the bonded indebtedness of the City of Santa Cruz, then, inasmuch as the city authorities of Santa Cruz, acting for and on behalf of the city, and as the city's authorized officers, gave to this statute the con-

struction that it authorized the refunding of such bonds, and on such construction the voters of the city, by a vote of 725 for bonds to 22 against bonds, expressly authorized the refunding of these very $89,000 water company bonds (they being expressly mentioned in name in the notice of election), and on such construction the city issued these bonds and delivered them, with recitals that they were issued to fund the bonded indebtedness of the City of Santa Cruz, and they have come into the hands of *bona fide* purchasers thereof who have paid out their money on the faith of these acts of the City of Santa Cruz and of their authorized officers—we say that if even such construction of the statute were doubtful, then, under all these circumstances, the courts should and will hold the city to its construction of the statute and to the validity of its acts, so far as respects the *bona fide* holders of these bonds.

A case precisely in point is *Van Hostrup vs. Madison City*, 1 Wall., 291 (1863). This was an action brought against the City of Madison, Indiana, on certain coupons attached to bonds issued by the city, which bonds (p. 291) "promised to pay the president of the *Columbus and Shelby* Railroad Company, *or bearer*, $7,000," etc., etc. The city charter authorized the city to borrow money and subscribe stock (p. 292) "for making a road or roads *to* said city"—*i. e.*, to Madison.

(p. 292:) "The Columbus and *Shelby* Company (the company to which the subscription was made), was organized to construct a road from Columbus to Shelby County, terminating at Shelbyville. *But Columbus was forty-six miles from Madison;* Shelbyville being about twenty-three miles north of *it*. Through Columbus, and by means of the connection

with the Madison and *Indianapolis* road, the Columbus and Shelby road did lead to Madison and nowhere else; though if regarded as an independent and isolated road, and as one between Shelby and Columbus only, it could not be said to be a road *to* the city designated. The diagram [printed in the record, p. 292] will elucidate the matter."

The defense to the coupons was that the (p. 293)

" said Columbus and Shelby Railroad Company was not a chartered company for the purpose of making a road *to* the city of Madison aforesaid, but to make a road from Columbus to Shelbyville, the nearest terminus of said road being forty-six miles distant from Madison."

It was shown, too, on the face of these bonds (p. 291) that they were issued to " the *Columbus and Shelby* Railroad Company, or bearer." This court, however, held these coupons valid and reversed the judgment of the lower court, which held them invalid. Mr. Justice NELSON, giving the opinion of the court, after stating that although the said Columbus and Shelby Railroad did not run to Madison, yet it might possibly be construed as " a road or roads to the said city," within the meaning of the charter, said (p. 297):

" Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bona fide* puschasers for value, we should have felt bound to acquiesce in it."

The notice of election distinctly informed the citizens and voters of the city of Santa Cruz that the city council intended to refund the $89,000 bonds of the

City Water Company, which had been assumed and agreed to be paid by the city. The said notice of election is as follows (Additional Finding of Fact No. 2, Record, p. 34):

"NOTICE OF SPECIAL ELECTION.

To the qualified electors of the city of Santa Cruz, and to all whom it may concern:

Notice is hereby given that a special election has been duly and regularly called, and will be held in and for the city of Santa Cruz, on Tuesday, the thirteenth day of March, 1894, at which there will be submitted to the qualified electors of said city the question of refunding the following bonded indebtedness of said city of Santa Cruz, issuing bonds therefor and providing for the payment of the same, viz:

* * * * * *

(2.) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893), of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company, of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company, of New York, as trustee, party of the second part therein, and which said bonds outstanding, were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz;" etc.

Thus, the people of the city of Santa Cruz were distinctly and specifically informed that these $89,000 water company bonds were to be refunded, if the people of the city so voted, and they did so vote.

Furthermore, the people of the city of Santa Cruz were distinctly and specifically informed that these bonds were to be refunded by the issue of *negotiable* bonds—that is, bonds payable to bearer, and passing from hand to hand by delivery. The notice of election set forth the form of the refunding bonds (Record, p. 36). Still further, the said refunding bonds, the form of which was set forth in the notice of election, recited that they were issued

" for the purpose of refunding *the bonded indebtedness of said city* and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, entitled," etc. (giving the title of the refunding act approved March 1, 1893).

The voters of the city of Santa Cruz, by 735 votes for and 22 votes against, thus expressly and distinctly authorized the issue of these refunding bonds to refund the $89,000 water company bonds, and authorized the issue of such negotiable refunding bonds, payable to bearer, and containing the recital above quoted, that they were issued " for the purpose of refunding the bonded indebtedness of said city."

Not only did the people of the city of Santa Cruz, by a vote of 735 votes for to 22 against the issue of these refunding bonds, expressly authorize their issue, but not one person in all the city of Santa Cruz made any effort to prevent, as illegal, the issue of bonds to refund the $89,000 water company bonds. This thing was not done in a corner. The proceedings for the issue of these bonds were all open and public, thoroughly advertised, and known to everybody in the city. No injunction proceedings to stop the issue of these refunding bonds were taken by any interested person. The city officers issued these refunding

bonds, acting by this unanimous vote and sanction of the people of the city, and no hand was raised to stop them. The city and its officers thus authorized and issued these bonds, well knowing that they might come into the hands of innocent purchasers. Under these circumstances there can be but one answer to the question as to whether, under the law, as well as under moral justice, the innocent bondholder should suffer, or the city of Santa Cruz should be held to that construction which the city, and its officers, and its qualified voters all unitedly put on this refunding act as authorizing the refunding of these $89,000 bonds.

Moreover, we insist that this vote of the people had the effect to expressly ratify the $89,000 for the water plant, and made it city "indebtedness evidenced by bonds," within the meaning of the enabling act (Jasper County case, ante, pp. 84, 85; Saline County case, ante, pp. 85, 86).

Recovery should have been allowed by the court on the three coupons of the Northern Counties Investment Trust Company, Limited, as well as upon all the other coupons and bonds involved in the present action.

Even if any one had actually read the said ordinances Numbers 314 and 315, he would have had no knowledge or notice that the refunding bonds had been illegally issued because issued in part to take up and pay certain bonded indebtedness of the water company, which, on the conveyance of the property of that company to the city, had been assumed and agreed to be paid by the city. For this reason the

Circuit Court erred in holding (Record, p. 25) that recovery could not be had in the present case on the three coupons owned by the Northern Counties Investment Trust Company, Limited, referred to in Finding of Fact No. 3 (Record, p. 18), which Finding of Fact is as follows:

"3. The Northern Counties Investment Trust Company, Limited, is the real owner of three of the coupons upon which this action is brought, and were attached to bonds numbered *numbered* 181, 182 and 183, dated April 16, 1894. Said Northern Counties Investment Trust Company, Limited, at and prior to the time of becoming owner of said bonds, had notice that the same had been illegally issued by the city of Santa Cruz for the purpose of refunding and taking up certain bonded indebtedness of the City Water Company of Santa Cruz."

The only reason for such holding was that the said Northern Counties Investment Trust Company, Limited, had notice that the bonds had been issued by the city of Santa Cruz "for the purpose of refunding and taking up certain bonded indebtedness of the City Water Company of Santa Cruz." The word "illegally," inserted in this Finding of Fact, is a mere conclusion of law by the court, and does not affect the finding.

The testimony confirms this statement of the effect of the third finding of fact by the court. Mr. Booth testified as follows (p. 128):

"I am secretary of the Northern Counties Investment Trust (Limited). In the month of September, 1893, the trust company received from the American Debenture Co., through Coffin & Stanton, Limited, three bonds of $1,000 each of the City Water Company of Santa Cruz, California, as part collateral for a loan of $1,000. In the month of May, 1894, the said bonds were exchanged for three bonds of the city of Santa Cruz, purporting to be executed by its officers on the sixteenth day of April, 1894," etc., etc.

Mr. Booth further testified (p. 129) :

" The trust company, at the time it came into possession of these bonds, had no knowledge or notice relative to the title to the same of the person or persons from whom it received possession, nor as to the relations between Walter Stanton and the defendant. It made no investigation with reference to the indebtedness of the defendant existing at the time these bonds were taken."

This testimony shows that the Northern Counties Investment Trust Company, Limited, had no notice of any illegality in the issue of the said bonds, unless it be that they were illegal, because issued for refunding and taking up certain bonded indebtedness of the City Water Company of Santa Cruz, which had been assumed and agreed to be paid by the city on its purchase of the water plant, and this testimony shows that this is the only illegality meant by the court in its finding of fact Number 3 (Record, p. 12), as to notice to the Northern Counties Investment Trust Company, Limited.

We therefore submit that recovery should have been allowed on these three coupons, as well as upon all the others involved in this action.

CERTAIN FURTHER ALLEGED DEFENSES RAISED BY THE DEFENDANT IN THE CIRCUIT COURT AND IN THE CIRCUIT COURT OF APPEALS CONSIDERED, AND SHOWN TO HAVE NO MERIT WHATEVER.

The foregoing part of this brief covers all the questions on which the Circuit Court of Appeals decided this case ; and we might, perhaps, well end our brief

here. We find, however, on examining the briefs as submitted by the counsel for the defendant the City of Santa Cruz, in the Circuit Court of Appeals, that certain other defenses to the bonds were attempted to be made, and, as some of those alleged defenses may possibly be urged in this Court, we proceed to consider them, and to show that none of them has any merit whatever. These defenses were made before the Circuit Court, and the learned judge who rendered the decision of the Circuit Court held that none of such alleged defenses was good. The judgment and opinion of the Circuit Court in this respect are clearly right, and the Circuit Court of Appeals, in its opinion, did not express any views contrary to the decision of the Circuit Court as respects these defenses. In other words, neither of the courts below held any of these defenses good. We proceed now to consider the same.

A.

The diverse citizenship of the parties sufficiently appears on the record in this action. There is no ground for the plaintiff's objection to the jurisdiction of the Circuit Court in this respect. The Circuit Court and the Circuit Court of Appeals committed no error in holding that the United States Circuit Court had jurisdiction of this case.

The complaint (Record, p. 3) alleges that the plaintiff Waite is a resident and citizen of the State of Massachusetts, and that the defendant The City of Santa Cruz is a municipal corporation organized and exist-

ing under a certain statute of the State of California, citing the statute.

These allegations were not denied in the answer, and, therefore, they stand admitted on the record, and there was no need of any finding of fact in regard to them. This is the rule at common law, and is also the rule under the practice and pleading in California. See *First National Bank of Los Angeles vs. Maxwell*, 123 Cal., 360, 366, where the court says, concerning a certain fact (p. 366):

"It was so alleged in the complaint, and not denied in the answer. A finding is unnecessary where a fact is admitted by the pleadings."

As the bonds and coupons are payable to bearer, it is no objection to the jurisdiction that they were assigned to plaintiff for collection only.

It is not necessary either to allege or prove that the assignors of the plaintiff could have maintained a suit on these bonds and coupons in the United States Circuit Court. These bonds are promissory notes, or choses in action, payable to bearer, and made by a corporation, and are, therefore, within the exception of the act of Congress of March 3, 1887, Chapter 373, 24 Stat., 552, as corrected by the act of August 13, 1888, Chapter 866, 25 Stat., 433, and, therefore, it is immaterial whether the plaintiff's assignors could sue or not, and it is not necessary that the complaint contain any averment that the suit could have been maintained by the assignors of the plaintiff, nor is it necessary that any finding to that effect be made. This precise point has been expressly determined by this Court in the recent case of *New Orleans vs. Quinlan*, 173 U. S., 191

(1899). Chief-Justice FULLER, giving the opinion of the Court, says (p. 191):

"This was an action brought in the Circuit Court of the United States for the Eastern District of Louisiana by Mary Quinlan, a citizen of the State of New York, against the city of New Orleans, to recover on a number of certificates owned by her, made by the city, and payable to bearer. **Defendant excepted to the jurisdiction because the petition contained no averment that the suit could have been maintained 'by the assignors of the claims or certificates sued upon.'"**

The Court, after referring to the Judiciary Act of 1879, and the act of March 3, 1875, says (p. 192):

"By the first section of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, the provision was made to read as follows: 'Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.'

These certificates were payable to bearer and made by a corporation; they were transferable by delivery; they were not negotiable under the law merchant, but that was immaterial; they were payable to any person holding them in good faith, not by virtue of any assignment of the promisee, but by an original and direct promise, moving from the maker to the bearer. *Thompson* v. *Perrine*, 106 U. S., 589. They were, therefore, not subject to the restriction, and the Circuit Court had jurisdiction."

In *Loeb vs. Columbia Township Trustees*, 179 U. S., 472, Mr. Justice HARLAN, giving the opinion of this Court, says (p. 486):

"As, therefore, the bonds in suit were executed by the defendant township, a corporation, and are paya-

ble to bearer, the present holder, being a citizen of a State different from that of which the township was a corporation, was entitled to sue upon them *without reference to the citizenship of any prior holder*. *Thompson* v. *Perrine*, 106 U. S., 589, 592–3. This point was properly decided for the plaintiff."

The " chose in action " in question in *Mexican National Railroad Company vs. Davidson*, 157 U. S., 201, cited by the learned counsel for the city of Santa Cruz, was *not payable to bearer*, and hence not within the exception in the act of Congress of 1887, as corrected in 1888.

The learned counsel for the defendant, The City of Santa Cruz, however, object in their brief in the United States Circuit Court of Appeals that the Circuit Court had no jurisdiction of this action, because it was found by the court (Record, p. 18, Finding of Fact No. 2) :

" That the plaintiff did not pay any money consideration for the assignment to him of any of said bonds or coupons, but all of said bonds or coupons were assigned to plaintiff for collection only."

That fact, however, is no objection to the jurisdiction of this Court and the maintenance of this action. The plaintiff is a *bona fide* holder of these bonds and coupons. A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser.

McClure vs. Oxford Township, 94 U. S., 429.

These bonds and the coupons are payable to bearer and transferable by delivery, and may be sued upon by the bearer. As the previous holders of the bonds in suit were *bona fide* holders for value (Finding of Fact No. 12, Record, p. 24, and conclusion of Law

No. 2, Record, p. 25), the plaintiff can avail himself of such previous holder's position without showing that he himself has paid value.

Montclair vs. Ramsdell, 107 U. S., 147.

It is no objection to the maintenance of this action that the plaintiff did not pay any money consideration for the assignment to him of any of the said bonds or coupons, but that all of said bonds and coupons were assigned to plaintiff for collection only, for it does not anywhere appear in the pleadings or findings of fact in this case that any of the previous holders of these bonds were residents or citizens of the State of California, and if the evidence could be looked into in this matter, it would show that the previous holders of these bonds were non-residents and not citizens of the State of California.

Bernards Township vs. Stebbins, 109 U. S., 341, is a case directly in point. In that case it appeared that certain citizens of the states of New Jersey, New York and Pennsylvania had delivered bonds and coupons to the plaintiff (p. 347) "*solely for the purpose of bringing suit*" on the same. This Court held that, so far as respects the bonds or coupons owned by the citizens of such states other than the state of New Jersey, the suit could be maintained in the federal court, but could not be maintained as respects the bonds or coupons owned by the citizens of the state of New Jersey, of which state the defendant was a citizen. The Court on this point said (p. 356):

"But no valid objection has been shown to the maintence of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned either by themselves or by other citizens of New York or Pennsylvania, to a sufficient

amount by each owner to sustain the jurisdiction of the circuit court " (citing numerous cases).

This case has never been in the least questioned or overruled.

Accordingly, in the present case, as above stated, the Circuit Court, and also the Circuit Court of Appeals, all of the judges concurring on this point, held that the United States Circuit Court had jurisdiction.

Of course, if it appeared on the record in this case that the federal court had not jurisdiction of the case, then the proper judgment of the Circuit Court of Appeals would not have been to reverse the judgment of the Circuit Court, with direction to enter judgment for the defendant (Record, p. 321), but to reverse the judgment, with direction to dismiss the action, so that any judgment would not be an estoppel. In this view the judgment of the Circuit Court of Appeals would be clearly erroneous, and should be reversed.

Great Southern Fire Proof Hotel Company vs. Jones, 177 U. S., 449, 458.

B.

The Circuit Court had jurisdiction of this action at law on the bonds and coupons in question, notwithstanding the remedy in the State courts might have been by mandamus.

The learned counsel for the City of Santa Cruz undertook to make an argument in the United States Circuit Court of Appeals that the United States Circuit Court, sitting at common law, had no jurisdiction of this action to obtain a personal judgment against the City of Santa Cruz upon the bonds and coupons

in question. The law is well settled to the contrary by numerous decisions of this Court. This is true in the federal courts, although a different remedy might prevail in the state courts, as, for example, where, under state statutes, state courts might, in the first instance, and without any judgment upon the bonds being previously had, issue a writ of mandamus to compel municipal officers to pay the bonds, and, if necessary, to levy a tax for that purpose.

In 2 Dillon on Municipal Corporations, Section 856, the author states the results of the decisions of the courts as follows :

" The remedy of the municipal or county bondholder *in the Federal courts is to sue at law and obtain a judgment* to establish the validity and amount of his debt. Thereupon it is usual to issue execution, if the corporate debtor *can*, by law, have property subject to execution. On a return of the writ *nulla bona* or unsatisfied, application is made upon an information or relation under oath, reciting these facts for a *mandamus* to compel the levy and collection of a tax to pay the judgment " (citing cases).

In the case of the *County of Greene vs. Daniel* and *County of Pickens vs. Daniel*, 102 U. S., 187, this Supreme Court (Mr. Chief Justice WAITE giving the opinion) says (p. 195) :

" In the State courts, under the rule as stated in *Shinbone vs. Randolph County*, 56 Ala., 183, and other cases, a mandamus would lie, without reducing the coupons to judgment, to compel the commissioners' court to levy and collect the taxes necessary to pay what was due. The rule is different, however, in the courts of the United States, where such a writ can only be granted in aid of an existing jurisdiction. There a judgment at law on the coupons is necessary to support such a writ. The mandamus is in the nature of an execution to carry the judgment into effect (*Bath County vs. Amy*, 13 Wall., 244; *Graham vs. Norton*, 15 Wall., 427). A suit, therefore, to get

judgment on the bonds or coupons is part of the necessary machinery which the courts of the United States must use in enforcing the claim, and the jurisdiction of those courts is not to be ousted simply because, in the courts of the State, a remedy may be afforded in another way."

See, also, the case of *Riggs vs. Johnson County*, 6 Wall., 166, a leading case on the issue of a writ of mandamus after obtaining judgment on municipal bonds.

The fact that there was a provision for a tax levy to pay the principal and interest of the bonds now in question, makes no difference as to the method of procedure in the federal courts, namely, by action at law to obtain a judgment on the said bonds, and thereafter, if necessary, a mandamus to compel the levy of a tax, as prescribed by the constitution and statutes of the State.

It was urged by the learned counsel for the City of Santa Cruz, in their brief in the United States Circuit Court of Appeals, that the present bonds and coupons were payable by a special tax out of a particular fund. It is, perhaps, rather difficult to understand exactly what the learned counsel meant by these bonds being payable out of a particular fund. Such is obviously not the fact or the law. When a municipal obligation is spoken of as being payable out of a "special fund," the ordinary meaning is that the obligation is not payable by a tax levied upon all the taxable property in the municipality, but is payable either by some special assessment on only part of the property, or out of some other special fund not raised by a general tax upon all the property in the municipality. The bonds

in question in the present case were not bonds payable out of a special fund in any such sense. The bonds now in question were authorized to be issued, and were issued, as *general obligations* of the City of Santa Cruz —obligations *in personam*—the city promising generally and absolutely to pay the said bonds. It is true that the constitution of the State of California provides (Article XI., Section 18) :

" Before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same."

The act of March 1, 1893, under which these bonds were issued (see the Act printed on this brief, pp. 3-5), provides :

" Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one-fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid."

The ordinances, Number 314, Number 315 and Number 320 (see Findings of the Court, Record, pp. 30, 37 and 21), made provisions similar to those made in the statute for the levy and collection of a sufficient tax to pay the principal and interest of the bonds. These provisions of the constitution and statute and ordinances do not constitute a special fund for the payment of these bonds in any such sense as to relieve the City of Santa Cruz from its general and absolute obligation *in personam* to pay the principal and interest of these bonds. These bonds are not in any such sense

payable out of a special fund, neither is this tax a special tax, nor the fund produced thereby a special fund, as those words are ordinarily understood. *This tax is a general property tax upon all the taxable property in the city*, and it is levied precisely as other general property taxes, and at the same times. It is true that this tax is to be applied to the payment of the principal and interest of these bonds, but this is only saying that this tax is to be used for a certain purpose—namely, for paying the principal and interest of these bonds. How this fact can in any wise operate to deprive the United States Circuit Court, sitting at law, of jurisdiction in this case, passes comprehension. It is not at all inconsistent with the Circuit Court's rendering a judgment *in personam* against the City of Santa Cruz on these bonds, which are its absolute and general obligation, and then afterwards, if necessary, issuing its writ of mandamus to compel the levy and collection of this very tax, and the application of the same to the judgment so obtained.

But however this may be, even if the fund raised by this tax were a " special fund " (whatever the learned counsel for the city may mean by that), still, as these bonds are the general obligation of the City of Santa Cruz, the Circuit Court of the United States, sitting at law, has jurisdiction to render a general judgment against the city thereon, and it makes no difference whether or not the city, as between itself and its taxpayers, obtains the money to enable it to pay these bonds, or such judgment thereon, out of any "special fund," or from general taxation, or from any other source. This precise question has been decided by this Court in the case of *United States vs. Fort Scott*, 99 U. S., 152. In that case, the ordinance authorizing

the issue of the bonds expressly provided that the bonds (p. 159) :

" shall be paid, principal and interest, solely from special assessments, to be made upon and collected solely from the lots and pieces of ground fronting upon and extending along the street the distance improved."

This Court says, Mr. Justice HARLAN giving the opinion (p. 159), that this

" should be regarded only as an expression, in emphatic terms, of the purpose and duty of the city, as between all its taxpayers, to impose the cost of the proposed improvements upon the property specially benefited. There is no reason to presume that the ordinance was intended to mean more than the statute under which it was enacted. The general reference, upon the margin of the bonds, to the ordinance under which the improvement was projected, should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the city, set forth in the body of the bonds, itself to pay the bonds, with their prescribed interest, at maturity. The agreement is that the city shall pay the interest and principal at maturity. There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment."

The Court, therefore, held that a general judgment upon these special improvement bonds of the City of Fort Scott was proper, and that a mandamus to compel the levy of a sufficient tax upon all the taxable property within the city to pay the judgment, interest and costs was proper, and ordered judgment accordingly.

C.

The Act of March 1, 1893, gave Power to Issue Refunding Bonds.

The suggestion or argument of the learned counsel for the city that the said refunding act of March 1, 1893, does not authorize the issuance of bonds is so trivial and wholly without foundation as hardly to require serious consideration. Section 1 of the said act is as follows (Session Laws of California, 1893, p. 59):

"SECTION 1. That whenever any incorporated city or town, other than cities of the first class, in this State, has *an outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, Board of Trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as 'serials' one fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of Treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed six per cent. per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder, for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the Treasury to the credit of the funding fund, and shall be applied only for the purpose

of refunding the indebtedness for which they have been issued. Said common council or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.

Note that this act not only expressly provides that "the question of refunding such indebtedness" shall be submitted to the qualified electors, but also provides "*such bonds shall be* of the character known as serials," etc.; "*said bonds may be issued*," etc.; "*said bonds shall be sold*," etc. How any one can say, in the face of these express provisions, that this statute does not confer authority and express authority to issue refunding bonds passes comprehension.

Furthermore, this very refunding act of March 1, 1893, was before the Supreme Court of California in the case of *Los Angeles vs. Teed*, 112 Cal., 319, and that court expressly held the said act valid and constitutional, and refused to issue a mandamus requiring the president of the city council to sign the refunding bonds of the city of Los Angeles there in question, only because the said bonds were made payable at a bank in the city of New York, instead of being made payable at the office of the city treasurer of Los Angeles. The bonds in question in the present case are made payable at the office of the treasurer of the city of Santa Cruz.

There is, therefore, not the slightest foundation for the suggestion, or argument, of the learned counsel for the city of Santa Cruz that there is not statute authority for the issuance of the refunding bonds now in question.

D.

The act of March 1, 1893, authorizing the issue of the refunding bonds now in question (Session Laws of California, 1893, p. 59), does not violate any provision of the Constitution of California against special legislation. This has been expressly decided by the Supreme Court of California in the City of Los Angeles vs. Teed, 112 Cal., 319. There is, therefore, no foundation for the claim of counsel for the defendant, the City of Santa Cruz, that the act is unconstitutional.

City of Los Angeles vs. Teed, 122 Cal., 319, was an application for writ of mandamus to compel the president of the city council of Los Angeles to sign refunding bonds, proceedings for the issuance of which had been taken under said refunding act of March 1, 1893 (Session Laws of California, 1893, p. 59). It was objected by the counsel for the respondent (see his argument, Report, p. 322) that the act of 1883 and also the act of 1893 were unconstitutional "because they except cities of the first class, and are special and local legislation," citing cases. The court, however, expressly held (p. 328):

"On March 15, 1883, an act was passed (Stats. 1883, p. 370) authorizing the governing body of every municipal corporation, other than cities of the first class, to fund or refund *any* indebtedness of the corporation by a vote of four-fifths of their number. That act authorized the issue of bonds, to be exchanged for any existing indebtedness, or to be sold for money to be applied to the payment of such indebtedness.

"It is contended that this act violates the provisions of the constitution against special legislation. But there can be no question that the act classifying municipal corporations is constitutional *(Pritchett vs. Stanislaus County*, 73 Cal., 310*)*, and that in matters pertaing to municipal organization the legislature may make different regulations for the different classes so created *(Pasadena vs. Stimson*, 91 Cal. 249*)*. The subject matter of the act in question—the funding of municipal indebtedness—is 'peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population.' The act is, therefore, not obnoxious to that objection. * * *

"On March 1, 1893, an act was passed (Stats. 1893, p. 59) amending the act of 1883. By this amendment a submission to the voters was required in all cases, one-fortieth (instead of one-twentieth) of the principal was required to be paid each year, and authority was given to make the bonds payable either at the office of the city treasurer, or at a bank in San Francisco, New York, Boston or Chicago.

"It is contended that this act also is invalid, as special legislation; but what we have said as to the act of 1883 on this question applies equally to this act. It is also claimed that the legislature could not authorize a debt payable in twenty years to be refunded into a debt payable in forty years; but we fail to discover any force in this contention, and no reason is suggested or authority referred to supporting it."

E.

Refunding Act is not unconstitutional as impairing the obligation of contracts.

The learned counsel for the city of Santa Cruz claimed in their brief in the Circuit Court of Appeals that the said refunding act of March 1, 1893, is invalid under the constitution of California, and also under the constitution of the United States, on the ground that it impairs the obligation of existing contracts—

to wit, the contracts contained in the outstanding bonds of municipalities. They claim that Section 2 of the said act provides for the refunding of such bonds before maturity, without the consent of the holders thereof, thus impairing the obligation of such contract. There are several obvious answers to any such objection to the constitutionality of said act.

The first and most obvious answer to this objection is that it has not been adjudged in the present case (or in any other, so far as we have been able to ascertain) that the said statute authorizes a municipality to compel the holders of bonds not yet matured to accept payment of the same before maturity. The statute does not so provide. Section 2 of the said statute can be read as authorizing the application of proceeds of the sales of refunding bonds to the payment of bonds which have matured, or will have matured by the time the proceeds of such sales have been received by the municipality. So read, the statute is not open to any objection on the ground suggested by the learned counsel for the city of Santa Cruz. In the present case there is no finding of fact which compelled the Circuit Court to give to this statute any other construction in order to render the judgment which was rendered in the present case. There is no finding of fact as to when the original bonds became due, which were refunded by the present issue of bonds, neither is there any finding of fact that the holders of the said original bonds, even if such bonds had not yet matured, were not willing and anxious to receive payment of the said original bonds.

Even if Part of Statute Attempted to Violate Rights of Holders of Old Bonds, They Alone Could Complain, and Not the City.

It is well-settled law that, in the absence of any such facts, or even if such facts existed, the city cannot raise any such defense as that Section 2 of the said Act of March 1, 1893, impairs the obligation of the contracts contained in the old bonds. If the rights of the holders of those old bonds had been violated, they alone could complain of it. The said refunding act, as actually construed in the present case upon the facts as shown in the record, involves no such question.

A case directly in point is *Provident Institution for Savings vs. Jersey City*, 133 U. S., 506. In that case the statute made water rates a charge upon lands in a municipality, with a lien prior to all encumbrances, in the same manner as taxes and assessments. The statute in terms applied to all mortgages, and made no express distinction or mention of mortgages made before, or mortgages made after, the passage of such statute. In the said case, before this Court on writ of error to the Court of Chancery of the State of New Jersey, it was urged that this statute violated the Fourteenth Amendment to the Constitution of the United States by depriving the mortgagee of his superior lien. The particular mortgage then before the Court, however, was a mortgage made *after* the passage of the said statute, and, therefore, this Court said (p. 514):

"What may be the effect of those statutes in this regard upon mortgages which were created prior to the

statute of 1852 it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to that statute, but long subsequent thereto."

This Court therefore held that the Constitution of the United States had not, in the case before the Court, been violated by the enactment of the said statute, and that such statute was valid and enforceable as respects the mortgage involved in that case. The Court thus refused to pass upon any moot question not on the record in the case before it.

In the case of *Sweet vs. Rechel*, 159 U. S., 380, Mr. Justice HARLAN, giving the opinion of this Court, said (p. 392):

"In determining whether the Legislature in a particular enactment has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition that if a Statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed (*Talbot vs. Hudson*, 16 Gray, 417, 422; *Fletcher vs. Peck*, 6 Cranch, 87, 128; *Sinking Fund Cases*, 99 U. S., 700, 718)."

Courts do not sit to hear moot questions as to the constitutionality of statutes any more than to consider any other moot questions. They deal only with actual cases which are before them, and with actual questions relating to the rights and interests of the parties actually arising in such cases on the record. No Court will listen to a discussion of the constitutionality of a statute in any actual case which is before it, unless in such case *the complaining party* has suffered under the statute in the particular respect in which he claims the

statute is unconstitutional. A complaining party is not allowed to set up in any case a moot question of what might be done (but has not been done) under the statute to affect his interests, or what has been done, or what might be done, to affect the interests *of third* persons not parties to the action or suit.

These principles were stated by Mr. Chief Justice SHAW in the case of *Wellington et al., petitioners, &c.* (16 Pick., 87):

"In considering the question, whether the act passed June 5, 1830, providing for the enclosure and appropriation of Cambridge common is a constitutional act, having the force and effect of law, the delicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. Still, however, it cannot be doubted, and I believe it is nowhere denied, that in a limited government like ours, acting under a written constitution with numerous and detailed provisions, a constitution which is in itself perpetual and irrepealable except by the people themselves, and which imposes many restraints upon the power of the legislature by express provisions and many others by necessary implication, and where the same constitution has provided for the establishment of a judiciary as a co-ordinate department of the government, with power in all cases to expound the laws, to declare what has and what has not the force of law, and to apply them to the investigation and adjustment of the rights, duties and obligations of citizens, in the actual administration of justice, it is clearly within the power, and sometimes the imperative duty of courts, to declare that a particular enactment is not warranted by the power vested in the legislature, and therefore to the

extent, to which it thus exceeds the power of the legislature, it is without efficacy, inoperative and void. Perhaps, however, it may be well doubted, whether a formal act of legislation can ever with strict legal propriety be said to be void ; it seems more consistent with the nature of the subject, and the principles applicable to analogous cases, to treat it as voidable. But whether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected. *Prima facie*, and upon the face of an act itself, nothing will generally appear to show that the act is not valid ; and it is only when some person attempts to resist its operation and calls in the aid of the judicial power, to pronounce it void, as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law, in the conclusion, that such an act is not void, but voidable only ; and it follows as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose.

" Besides, and this is another argument leading to the same result, if a legislative act may or may not be valid according to circumstances, courts are bound by the plainest principles of exposition, as well as by a just deference to the legislature, to presume the existence of those circumstances which will support it and give it validity. For instance, if an act of the legislature appears on the face of it to be an encroachment on the rights of any persons, but would nevertheless be valid if passed with the consent of those persons, the court is bound to presume that such consent was given. And this presumption must prevail in favor of the validity of the act, until the contrary is shown, and shown too by a person having an interest in the main-

tenance of the rights supposed to be thus injuriously affected, and having the right to call for the interposition of the court for their support and protection, and a stranger can have no right to appear and contest the validity of the act upon such a ground."

The same principle is stated by Judge COOLEY, *Principles of Constitutional Law*, 2d ed., 152-3:

"4. The court will not listen to an objection made to the constitutionality of an Act by one whose rights are not affected by it, and who consequently can have no interest in defeating it. *For example, one who has received compensation for property appropriated by statute to a public use will not be suffered afterwards to dispute the constitutional validity of the statute.* The statute is assumed to be valid until some one complains of it whose rights it invades. The power of the court can be invoked only when it is found necessary to secure and protect a party before it against an unwarranted exercise of legislative power to his prejudice."

The same principle was involved in the case of *Paulsen vs. Portland*, 149 U. S., 30, where Mr. Justice BREWER, giving the opinion of the court, says (p. 42):

"Without continuing this inquiry any further, we are of the opinion that, notwithstanding the doubt arising for the lack of express provision for notice in ordinance 5068, it can not be held, *in view of the notice which was given*, of the construction placed upon this ordinance by the council thereafter, and of the approval by the Supreme Court of the proceedings as in conformity to the laws of the State, that the provisions of the federal Constitution, requiring due process of law, have been violated."

So also it has been frequently held by this court on writ of error that the right or title claimed must be claimed by the plaintiff in error for himself and not for a third person.

Henderson vs. Tennessee, 10 Howard, 311.
Owings vs. Norwood's Lessee, 5 Cranch, 344.

Verden vs. Coleman, 1 Black, 472.
Long vs. Converse, 91 U. S., 105.
Miller vs. National Bank of Lancaster, 106 U. S., 542.
Manning vs. French, 133 U. S., 186.
Giles vs. Little, 134 U. S., 645.
McNulta vs. Lockridge, 141 U. S., 327.
Ludeling vs. Chaffee, 143 U. S., 301.
Brown vs. Smart, 145 U. S., 454.
Texas & P. R. Co. vs. Johnson, 151 U. S., 81.

See, also, *Loeb vs. Columbia Township Trustees*, 179 U. S., 472, 490, quoted on this brief, p. 146; and *Lampasas vs. Bell*, 180 U. S., 276 (1901), quoted on this Brief, p. 173.

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Furthermore, the said Section 2 of the refunding act of March 1, 1893, could be wholly stricken out of the said statute, and there would be left ample power to issue the bonds now in question, and to levy taxes for the payment of the principal and interest of such bonds. This said Section 2 is wholly separable from the said Section 1, and the power contained in the said Section 1 is not made conditional upon, or dependent in any way upon the provisions of said Section 2.

The language of this Court in *Loeb vs. Columbia Township Trustees*, 179 U.S., 472, is pertinent. Mr. Justice HARLAN, giving the opinion of the court, says (p. 488):

"Now let it be supposed that the third section of the special act in question prescribed a rule by which all inquiry is precluded in respect of special benefits accruing to the adjoining property owners, and that an assessment under that section would be invalid under the decision in *Norwood vs. Baker*, as taking private property for public use without just compensation—upon which question we express no opinion—would it follow that the township would escape liability on the

bonds? We think not. The fourth section of the act, authorizing and *directing* bonds to be issued for the purpose of raising the money necessary to meet the expenses of the improvement in question, may stand with sections one and two, even if section three were held to be void as prescribing an illegal mode of assessment. The power to issue bonds to raise the money, and the mode in which the township should raise the necessary sums to pay the bonds when due as well as the interest accruing thereon from time to time, are distinct and separable matters."

Mr. Justice HARLAN refers to the fact also (p. 489) that

"There is some ground for saying that the legislature would not have passed the act without the third section; and that was the view expressed by the learned judge who tried the case below. But we do not think that such is so manifestly the case as to justify the courts in refusing to execute the valid parts of the statute when that can be done in harmony with the intention of the legislature to have the improvement in question made by the township and its cost met by issuing bonds."

So in the present case there is no ground to suppose that the legislature of California would have failed or declined to pass Section 1 of the said refunding act of March 1, 1893, except on the condition of accompanying such section by some provision which would compel the holders of old bonds not yet matured to accept payment thereof before maturity. As we have already stated, there is no ground to suppose that any part of the said refunding act of March 1, 1893, was intended to compel the holders of any old bonds to accept payment of the same before maturity; but if Section 2 of the said act of March 1, 1893, on any theory could have any such meaning attached to it as claimed by the learned counsel for the city of Santa Cruz, still it cannot be supposed that the legislature of California

would have declined to enact Section 1 of the said act authorizing the issue of refunding bonds, for the purpose of refunding such indebtedness as had matured or was about to mature. Certainly the enactment of such a refunding statute for such a purpose would be proper and desirable, and not open to any objection. Section 1, therefore, of the said refunding act of March 1, 1893, could stand alone as sufficient authority for the issuance of the refunding bonds now in question.

The objection of the learned counsel for the city is based upon the idea that the City of Santa Cruz has undertaken to compel the holders of old bonds to take payment of their bonds before they become due. If this were the fact, then the holders of the old bonds might, when their bonds became due, bring an action upon their bonds, and endeavor to obtain a judgment thereon, and in such case the question could be raised whether the City of Santa Cruz could compel the holders of those old bonds to accept payment of the same.

See on this point the cases *supra* (p. 149, *et seq*).

No such question, however, arises on the record in the present case. There is no proof nor any finding of fact that the City of Santa Cruz has attempted, or is attempting, to compel any holder of old bonds to take payment for the same before their maturity; and, even if there were any such finding of facts, that would concern only the holders of such old bonds, and they alone could raise any question that the obligations of those old bonds were being impaired contrary to the Constitution of California and of the United States. The City of Santa Cruz cannot raise any such question; and, even if it could, there are no findings of fact in the present case on which to base any such legal

proposition. For all that appears in the findings of the court in the present case, the holders of the old bonds to be refunded were perfectly willing, and even anxious, that their bonds should be paid off before their maturity, and they were the only ones whose constitutional rights would have been violated, even according to the proposition of the learned counsel for the City of Santa Cruz.

Furthermore, it does not appear in the findings of the court when the said old bonds would mature, and, therefore, there is no basis of fact whatever upon which to build any such argument on behalf of the holders of those bonds as the learned counsel for the defendant have attempted to build.

Recitals in Bonds estop City from making any such Defense.

All of this defense as to the old bonds being not yet due is wholly immaterial as respects the *bona fide* holder of the refunding bonds and the coupons now in question. These bonds recite that they are issued "for the purpose of refunding the bonded indebtedness of said city, and issuing bonds therefor, and providing for the payment of the same," &c., and on no theory could such a defense be set up against the *bona fide* holders of these refunding bonds, as that the original bonds to be refunded were not due, even if it were good as against a holder of these bonds who had notice. But, as we have already seen, no facts were proved and no findings of fact were made in the present case which would make out such a defense as against any one.

F.

Bonds in question are not invalid because they contain a clause pledging the faith and credit and all the real and personal property of the city for the payment thereof.

The learned counsel for the City of Santa Cruz undertake to make an argument that because the bonds in question in the present case contained the following clause (Record, p. 5), to wit:

"And for the payment of the principal sum herein named, and the interest accruing thereon, the said City of Santa Cruz is held and firmly bound, and its faith and credit, and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity,"—

that, therefore, the said bonds are void. The ground of objection of the learned counsel for the city is that this clause contains the following:

"The real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity."

They contend that there is no authority to pledge the real and personal property of the city for the payment of the bond. The learned counsel cite Article XI., Section 15, of the Constitution of California:

"Sec. 15. Private property shall not be taken or sold for the payment of the corporate debt of any political or municipal corporation."

Obviously this clause was inserted in the bond, not with a view of attempting to make literally any pledge of the real and personal property belonging as private

property to the inhabitants of the City of Santa Cruz, but was intended as a general statement that the holder of the bond might look to all the real and personal property of said city as liable to taxes to pay the bond and interest thereon. These words could not be taken literally, and could not have been intended to be taken literally for several reasons:

1. Such a view would mean that all the real and personal property of said city—not the private property of inhabitants of said city, but the real and personal property of the corporation itself—are hereby pledged. This, apparently, however, is not what was intended, but if it was intended, then it would not be open to objection on any ground urged by the learned counsel for the City of Santa Cruz.

2. Another objection to taking these words literally is that a pledge of property necessarily implies a change of possession, and that is characteristic of a pledge as distinguished from a mortgage or lien, and obviously this clause in the bond did not make any change of possession of the real and personal property of said city as a corporation, or the private property of the inhabitants thereof.

3. These words must be read with the other words in the sentence in order that they may be understood. So read, they do not mean a literal and technical pledge. The full clause reads as follows:

"And its faith and credit, and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity."

When this clause says that the "faith and credit" of the city are pledged, it does not mean a "pledge" in any literal sense. That would be absurd. The

language is figurative. So, also, when the other words are added:

"And all the real and personal property of said city are hereby pledged."

The clause means that they are pledged not literally and technically, but in the sense that they are to be resorted to by means of taxation, as provided by law, to enable the city to make payment of the bond. Thus understood, the words are appropriate, and are not open to any objection such as was urged by the learned counsel for the defendant in error.

But even supposing that an attempt were made to take these words literally, and even supposing they would then be invalid, then these words would be only surplusage, which could be stricken out of the bond without in any way impairing its validity.

Clauses of this kind have been frequently inserted, as, for example, in the bonds in the following cases, which bonds were held good by the Supreme Court of the United States, to wit:

Humboldt Township vs. Long, 92 U. S., 642.
Pana vs. Bowler, 107 U. S., 534.
Oregon vs. Jennings, 119 U. S., 76.
Evansville vs. Dennett, 161 U. S., 437.

Any such defense could not be raised by the city, but only by a property owner, and then only when it was proposed to enforce any alleged pledge of his property.

Furthermore, even if an attempt were made to take these words literally, they would not constitute any defense to this action on these bonds and coupons, but the question which is raised by the learned counsel for the

defendant in error could only be raised by some owner of real and personal property in the City of Santa Cruz, whose property was to be taken under and by virtue of the alleged pledge. In any such case the holder of such real and personal property might make such question, and have the matter determined. The City of Santa Cruz, however, cannot set up the rights of any such property owner as a defense to its personal obligation on these bonds. It will be time enough to raise any such question when the holder of these bonds undertakes to enforce any such alleged pledge against any such holder of real and personal property in the said city.

As was said by Mr. Justice HARLAN in *Loeb vs. Columbia Township Trustees*, 179 U. S., 472 (p. 490):

"The relief asked and the only relief that could be granted in the present action, is a judgment for money. If the township should refuse to satisfy a judgment rendered against it, and if appropriate proceedings are then instituted to compel it to make an assessment to raise money sufficient to pay the bonds, the question will then arise whether the mode prescribed by the third section of the act of 1893 can be legally pursued."

So in the present case the only relief demanded is a "judgment for money." If the City of Santa Cruz should then refuse to pay the judgment, and if any holder of such judgment should then undertake to enforce any alleged pledge upon the real and personal property of the City of Santa Cruz, the question would then arise whether such pledge was valid, but the question would not arise until some action was taken to enforce such alleged pledge. No such question arises in the present case.

Another case directly in point is the very recent one of *Lampasas vs. Bell*, 180 U. S., 276 (February 11, 1901). That was an action at law on certain interest coupons of Lampasas City Water Works bonds, issued by the city while acting under the provisions of Title XVII. of the Revised Statutes of Taxes of 1879, relating to the formation of municipal corporations. A defense urged by the city was (p. 282) that said Title XVII. was

"in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the boundaries of such corporations were not fixed by the legislature, nor do said statutes make any provisions by which said boundaries can be fixed by any tribunal or official before whom the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the proposed corporation."

The claim of the city was that because of such alleged unconstitutionality of said Title XVII. the taxpayers would be deprived of their property without due process of law, if the bonds were held valid. On this point Mr. Justice McKenna, giving the opinion of the Court said (p. 283):

"But what concern is it of the plaintiff in error [the City of Lampasas] whether the residents of such territory were or were not given an opportunity to be heard? It had no proprietary right or interest in 'territory proposed to be incorporated'; *it* was put to no hazard of taxation without a hearing, nor can it stand in judgment for those who had such interest or were put to such hazard. It was certainly the right of the residents of the territory to submit to incorporation and accept its burdens and its benefits. And the record shows that there was no question of its validity for six years. When questioned it was not on the ground that it was incorporated under an unconstitutional statute—not on the ground that it was imposed without a hearing on unwilling subjects—but on the

ground that the prior incorporation of 1873 had not ceased to exist.

"We said in *Clark* v. *Kansas City*, 176 U. S. 114 (quoting from Cooley's Constitutional Limitations, section 196), that 'a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.' That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. 'To this extent only is it necessary to go, in order to secure and protect the rights of all persons, against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose.' *Wellington, Petitioner*, 16 Pick. 87, 96."

See, also, on this proposition the cases cited on this brief, pages 160–165.

G.

It is no objection to the issue of these bonds that they may extend the time of payment of the indebtednesss thereby refunded more than forty years from the time of contracting the original indebtedness.

The learned counsel for the City of Santa Cruz, in their brief in the United States Circuit Court of Appeals, urge that the refunding act of March 1, 1893, is unconstitutional, because it authorizes the issue of bonds payable more than forty years from the time of contracting indebtedness sought to be refunded, contrary to the provisions of Section 18 of Article XI. of the constitution of California.

Precisely the same objection was made in respect of the funding bonds in question in the case of *City of Los Angeles vs. Teed*, 112 Cal., 319. The argument of

"FRANCIS J. THOMAS, *amicus curiæ*, for respondent," was as follows (p. 322):

"The refunding of the liabilities, and postponing the date of payment to May 1, 1935, which would exceed forty years from the time of contracting the same, is contrary to both the original and amended provision of the constitution (Const., art. XI., sec. 18; Stats. 1891, p. 523)."

The argument, of course, under this section of the constitution, is that as a tax is required to be levied to pay the interest and to constitute a sinking fund to pay the principal within twenty years, or, as amended in 1892, within forty years, from the date of contracting the indebtedness; therefore, the indebtedness must be paid and not refunded. Of course, the answer to any such argument is that the constitution does not anywhere, either expressly or by necessary implication, prohibit the refunding of any such indebtedness, and the general legislative power of the legislature is not to be limited, except by express provision of the constitution or by necessary implication.

On this point the court, in its opinion in *City of Los Angeles vs. Teed*, said (p. 329):

"It is also claimed that the legislature could not authorize a debt payable in twenty years to be refunded into a debt payable in forty years; but we fail to discover any force in this contention, and no reason is suggested or authority referred to supporting it."

The same question came before the Supreme Court of Illinois in the case of *Kane vs. City of Charleston*, 161 Ill., 179. The constitution of the State of Illinois requires the levying of a tax to pay the indebtedness within twenty years from the time of contracting the same. The question arose whether such indebtedness could be refunded, and the Supreme

Court of Illinois, after full consideration, decided that such indebtedness could be refunded, as there was no prohibition in the constitution.

H.

The bonds and coupons in question are not unauthorized or illegal because made payable in "gold coin of the United States."

The Act of March 1, 1893 (Session Laws of California, 1893, p. 59), under which these bonds were issued, provides:

"Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars, principal and interest being payable in *gold coin or* lawful money of the United States," etc.

Ordinance No. 314, calling the election, provides (Additional Finding No. 1, Record, p. 26) as follows (Record, p. 28):

"They [the bonds] * * * shall be payable, principal and interest, in gold coin of the United States."

The form of bond set forth in the said ordinance was made payable in (Record, p. 29) "gold coin of the United States."

The notice of election (Additional Finding No. 2, Record, p. 32) also stated (Record, p. 35):

"They [the bonds] shall be payable, principal and interest, in gold coin of the United States."

The vote of the electors of Santa Cruz was, therefore, in favor of the issuance of bonds payable in "gold coin of the United States." It is settled by the ex-

press decision of the Supreme Court of California that in such a case the bonds may be issued payable in gold coin of the United States. *Murphy vs. City of San Luis Obispo*, 119 Cal., 624, citing and distinguishing *Skinner vs. Santa Rosa*, 107 Cal., 465, in which latter case the vote of the people was for bonds "payable in gold coin or lawful money of the United States," and in which latter case also the Supreme Court of California held that the officers of Santa Rosa had no right to change the medium of payment of the bonds and make them payable in gold coin alone, after such vote of the people. But where the people voted for a bond payable in gold coin of the United States alone, such bonds were legal under a statute which provided that bonds should be made payable in gold coin or lawful money, and such was the decision of the Supreme Court of California in *Murphy vs. City of San Luis Obispo*, 119 Cal., 624.

There is, therefore, nothing in the objection raised by the defendant in error, that the bonds now in question are invalid because made payable in gold. On the contrary, this very point has been expressly passed upon by the Supreme Court of California, in *Murphy vs. City of San Luis Obispo*, and the bonds held valid in this very respect.

See, also, *Woodruff vs. Mississippi*, 162 U. S., 291.

I.

The learned counsel for the City of Santa Cruz undertook to make a point that the old bonds refunded by the present issue of bonds were invalid, because they were is-

sued after the act of March 15, 1887, had been repealed.

On this point it is sufficient to say that there is no such finding of fact by the court. But even if there were such a finding of fact, this would be immaterial, because there is no finding of fact that any holder of the present refunding bonds had any notice as to the time when said old bonds were issued, and the recital in the present bonds that they were issued to fund bonded indebtedness of the City of Santa Cruz is conclusive in favor of the *bona fide* holders of the present bonds that the old bonded indebtedness was valid (see on this point cases cited on this brief, pp. 40–49).

J.

Municipal bonds are negotiable instruments in California.

The California Negotiable Instruments Law contained in the Civil Code of that state expressly provides as follows (Deering's Annotated Codes, 1885).

"SECTION 3087. A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer."

"SECTION 3095. There are six classes of negotiable instruments, viz :

"1. Bills of exchange.
"2. Promissory notes.
"3. Bank notes.
"4. Checks.
"5. Bonds.
"6. Certificates of deposit."

Thus, the Civil Code of California in force when the bonds now in question were issued expressly provides that "bonds" are "negotiable instruments."

The refunding bond act of March 1, 1893 (Session Laws of California, 1893, p. 59), expressly authorizes cities to issue "bonds;" that is, *negotiable* bonds.

It is perfectly clear, therefore, that under express provisions of the statutes of California the municipal bonds now in question are negotiable instruments. There is no exception in the California negotiable instrument law such as that municipal bonds shall not be negotiable. Such an exception is contained in a negotiable instrument law enacted by one of the states—to wit, Wisconsin—the statute of which enacts that bonds of municipalities shall not be negotiable unless the statute authorizing them expressly so provides (Session Laws of Wisconsin, 1899, p. 683), but no such exception appears anywhere in the statutes of California. The reasons why no such exception is made by States generally are well stated by Mr. Justice HARLAN in the case of *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255, as follows (p. 276):

"Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that everyone understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Furthermore, the Supreme Court of California has, in numerous cases, expressly decided this very question. In the case of *Derby vs. The City of Modesto*, 104 Cal., 515, the validity of certain bonds of the City of Modesto was directly in issue. The Court says (p. 517):

"The bid of the Oakland Bank of Savings for the purchase of said bonds was accepted January 19, 1893, and the full purchase price thereof was by said bank paid into the city treasury, and the notice and protest of appellant was not served until March 15, 1894, the first installment of the principal and the interest having been paid by the city in the preceding December. Nor is it asserted by appellant in its said notice, nor does it appear from the statement, that the purchaser of the said bonds had any notice of the alleged defects in the proceedings upon which the issue of said bonds was based.

'The following doctrines are too well settled to be any longer open to question. A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds payable to bearer are subject to the same rules as other negotiable paper'. (Dillon on Municipal Corporations, 4th ed,, sec. 513, and cases cited in notes.)

The same learned author in succeeding sections, referring to the course of decisions in the supreme court of the United States, says: 'It has rejected, when necessary to protect the *bona fide* holders of such securities, narrow and rigid constructions of statutes authorizing the creation of such debts. Against such holders it has given no favor for defenses based upon mere irregularities in the issue of the bonds or upon noncompliance with preliminary requirements, not going to the question of *power* to issue them.' (Dillon on Municipal Corporations, sec. 515. See, also, *St. Joseph Township* v. *Rogers*, 16 Wall. 644.)

In the light of the principles enunciated by the foregoing authorities we will now notice the particular defects in the proceedings leading up to the issue of the bonds in the order in which they are stated by counsel for appellant."

The Court, therefore, held the bonds valid in the hands of the *bona fide* purchaser thereof, against all the objections raised concerning the said bonds.

The case of *Meyer vs. Brown*, 65 Cal., 583 (1884), is an authority directly in point, and especially pertinent

here, because the bonds in question in that case were refunding bonds, as are the bonds in question in the present case. The facts are sufficiently stated in the opinion of the court on motion for a new trial, as follows—to wit (p. 589):

"THE COURT: This is a motion for a new trial. At the trial before the referee **defendants offered to prove facts, which, it is claimed, would have shown that certain of the bonds described in the complaint herein, the payment of which is sought to be enforced by the mandate of this court, were issued in consideration of the surrender of bonds, purporting to represent indebtedness of the city of Sacramento, which bonds (last named) had been illegally issued, and did not constitute valid claims against the said city.**

"It is contended by the defendants that the referee erred in rejecting the evidence offered.

"We deem it unnecessary to enquire whether, assuming the facts to be implied by the defendants' offer of evidence, the bonds, in lieu of which the bonds in suit were issued, were invalid. True, the Act of 1858 (Stats. 1858, p. 280) provided that all 'legal' claims might be funded, but, as we understand the provisions of that act, the president of the board of supervisors, the clerk of the board, and the treasurer were authorized to determine, on behalf of the city and county of Sacramento, the legality of each claim presented, and, if satisfied of its legality, to issue a bond or bonds therefor. Even if the evidence offered would have shown that the officers mentioned violated their duty by deciding some claims to be legal which they knew were illegal, there was no offer to prove that the claims, alleged to be the consideration for the bonds sought to be enforced by this proceeding, were presented by plaintiff, or that any of such bonds issued to him. There is no averment in the answer, nor is there any finding in the record, or any evidence tending to prove, that plaintiff is other than a holder *bona fide* of the bonds. The bonds recite that they were issued in accordance with the law of 1858; they and the coupons attached are signed and authenticated as required by

that law. They are exactly such bonds as would have been authorized had the officers of the city and county indisputably allowed only 'legal debts and liabilities' of the former corporation—the city of Sacramento. At the trial, the *bona fides* of the plaintiff being conceded, there was but one question to be decided—to wit, Were the bonds such as the city and county had power to issue? No question of irregularity, or even fraud, on the part of the agents of the municipality, could be considered" (*Roneden vs. Jersey City*, 17 Rep., 253; *East Lincoln vs. Davenport*, 94 U. S., 801; *Pompton vs. Cooper Union*, 101 U. S., 196; *Sherman vs. Simmons*, 109 U. S., 737; *Louisiana vs. Pilsbury*, 105 U. S., 278).

Note the language of the court:

"The *bona fides* of the plaintiff being conceded, there was but one question to be decided—to wit, Were the bonds such as the city and county had power to issue? No question of irregularity, or even fraud, on the part of the agents of the municipality, could be considered."

Note also that in the case of *Meyer vs. Brown*, *supra*, the defendant offered evidence to show, as against a *bona fide* holder, that the old bonds refunded by the bonds then in question had been illegally issued, and did not constitute valid claims against the city, and the court held that the referee did not err in rejecting such evidence.

The Nevada Bank vs. Steinmitz, 64 Cal., 301 (1882), is also a case in point. In that case certain railroad aid bonds issued by Santa Cruz County, California, were sued upon. The following extract from the opinion given by MORRISON, C. J., is pertinent (p. 314):

"The Bank of Nevada purchased the bonds for value, without notice of any infirmity in them, and the only question is one of *power* in the board to issue them. (*Cromwell* v. *The County of Sac*, 96 U. S. 51;

1 Dillon Mun. Corp. § 515, and authorities there cited.) If the board did not have the *power* to issue the bonds there could be no such thing as a *bona fide* holder of them, as any purchaser would be held to have notice of the fact, where there was a total want of authority. (*Township of East Oakland* v. *Skinner*, 94 U. S. 258.) 'The following doctrines are too well settled to be any longer open to question. A *bona fide* purchaser of negotiable paper for value before maturity takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds payable to bearer are subject to the same rules as other negotiable paper.' (1 Dillon on Mun. Corp. § 113, and authorities there cited.) Speaking further on this subject, the same author says: 'The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint agains repudiation.' (1 Dillon on Mun. Corp. § 518.) 'It [the Supreme Court of the United States] has adopted when necessary to protect the *bona fide* holders of such securities, liberal construction of statutes and charters authorizing the creation of such debts. Against such holders it has given no favor to defenses based upon mere irregularities in the issue of the bonds or non-compliance with preliminary requirements, not going to the question of power to issue them.' (1 Dillon on Mun. Corp. § 515.)"

The court thus held that the county bonds there in question were negotiable, and were valid, and enforced their payment.

See, also, quoted on this brief, p. 68, the case of *State of California vs. Wells, Fargo & Company*, 15 Cal., 336 (1860), in which the Supreme Court of California expressly held that refunding bonds issued by the State were negotiable instruments, and that the defense was not open to the State, that the warrants funded by such bonds had been stolen from the treasury of the State after they had already been paid and canceled.

The learned counsel for the city of Santa Cruz cited on their brief in the United States Circuit Court of Appeals in the present case certain decisions of the Supreme Court of California, under which they claim that municipal bonds are not negotiable. But those cases do not sustain any such claim.

Sutro vs. Dunn, 74 Cal., 593, cited by the counsel for the defendant The City of Santa Cruz in their brief in the United States Circuit Court of Appeals as sustaining the proposition that bonds are not negotiable in California, does not support that proposition. The head-note of the case states accurately the point therein involved, as follows:

"A *bona fide* purchaser of bonds issued by the state of California for the loss of property incurred during the suppression of Indian hostilities, which bonds recite their issue in conformity with the act of April 25, 1857, and which are made payable only out of money thereafter to be appropriated by Congress for the payment of such expenses, is charged with notice of all the conditions imposed by the acts of the legislature and of Congress upon the subject of the act of April 25, 1857, and *cannot enforce the payment of the bonds until an appropriation therefor has been made by Congress.*"

The bonds there in question were payable only out of money thereafter to be appropriated by Congress, and the Court of course held that the plaintiff could not obtain a mandamus compelling Dunn, the State Comptroller, to draw a warrant to pay the bonds until a fund for the payment thereof had been created by Congress. That was all there was in the case. It did not involve or decide any such proposition as that municipal bonds are not negotiable in California.

In *Sutro vs. Pettit*, 74 Cal., 332, and in *Sutro vs. Rhodes*, 92 Cal., 117, the bonds there in question were

held invalid because issued beyond the amount expressly limited by statute. There was no recital in the bonds, and the Court, in *Sutro vs. Pettit* (which the case of *Sutro vs. Rhodes* merely follows), expressly distinguished the case from that where recitals are contained in bonds, saying, with regard to recitals (p. 336):

"No such question arises in the case at bar."

The case of *McCoy vs. Briant*, 53 Cal., 247 (1878), involved the validity of certain alleged bonds of the city of San Diego. The history of those bonds is more fully given in *Lehman vs. City of San Diego*, 83 Federal Reporter, 669. Those bonds were originally *issued without any statute authority therefor.* After they were issued the legislature passed an act validating certain ordinances of the city, which authorized the issue of the bonds. Certain of those bonds were not issued according to said ordinances, and the court held that those particular bonds were not validated. That case depended entirely on the particular facts, and is not at all an authority for the proposition that municipal bonds in California are not negotiable.

Zottman vs. San Francisco, 20 Cal., 102, and *Murphy vs. Napa County*, 20 Cal., 503, cited by counsel for defendant the City of Santa Cruz in the Circuit Court of Appeals did not involve bonds at all, but were suits by contractors for public works. *French vs. Teschemacher*, 24 Cal., 550; *Herzo vs. San Francisco*, 33 Cal., 145, and *People vs. Tomlinson*, 35 Cal., 507, also cited by counsel for defendant, did not involve bonds. The last-named case was one of an indictment for forgery of contract, but no note or bonds was forged or in any way involved.

It is unnecessary to pursue the subject further. The claim of counsel for the defendant the city of Santa Cruz that municipal bonds are not negotiable in California is utterly without foundation.

K.

William T. Jeter was the mayor, de jure, or at least de facto, and J. F. Hoffmann, E. G. Green and F. W. Lucas were members of the common council, de jure, or at least de facto, of the said city of Santa Cruz when the bonds in question were signed and ordered delivered and delivered to Messrs. Coffin & Stanton. The decision of the Circuit Court holding their acts as such officers valid was correct; and the objections of the Defendant are without foundation.

The findings by the court on this point are as follows (Finding of Fact, No. 9, Record, p. 22, and Finding of Fact, No. 13, Record, p. 24):

"9. On April 11, 1892, Wm. T. Jeter was duly elected mayor of the defendant City of Santa Cruz, and J. Howard Bailey, J. F. Hoffmann, E. G. Green and F. W. Lucas were, on the same day, duly elected members of the common council of said city, and the said persons so elected as mayor and members of the common council duly qualified for their respective offices within ten days after their said election, and duly entered upon the duties of their respective offices. Section 3 of an act of the legislature of the State of California, entitled 'An act to reincorporate the city of Santa Cruz,' approved March 11, 1876, provides that the mayor and common council of said city shall hold their offices for a term of two years, and until their successors are duly elected and qualified. On the ninth day of April, 1894, Robert Effey was duly elected as

mayor of said defendant city to succeed William T. Jeter, and duly qualified as such between the hours of eleven o'clock a. m. and two o'clock p. m. of April 16, 1894; and Messrs. Henry G. Ensell, John Howard Bailey, J. D. Maher, and Frank K. Roberts, were on April 9, 1894, duly elected members of the common council of said defendant city, and all of them duly qualified as such councilmen before the meeting of the common council of said city defendant held April 16, 1894. The persons so elected mayor and members of the common council on April 9, 1894, with the exception of J. Howard Bailey, who was re-elected councilman, did not actually enter upon their duties as such officers until May 7, 1894, and the said Wm. T. Jeter, J. Howard Bailey, J. F. Hoffmann, E. G. Green, and F. W. Lucas continued to act publicly as mayor and members of the common council of said defendant city until May 7, 1894, without protest from any person, and held seven meetings of said council between and including the date of April 16, 1894, and May 7, 1894."

"13. That all of the bonds and coupons sued on were in the form alleged and set out in the complaint, and bore date and were signed and attested in the form and upon the date and by the persons alleged in the complaint, but some of said bonds were signed by Wm. T. Jeter on April 16, 1894, after the qualification of his successor in the office of mayor."

The court also found, as a "conclusion of law" (Record, p. 25):

"That Wm. T. Jeter was the *de facto* mayor of the defendant City of Santa Cruz on the sixteenth day of April, 1894, and so continued to be until May 7, 1894; and that he and the persons who assumed to act as members of the common council of defendant on the sixteenth and twenty-third days of April, 1894, to wit, J. F. Hoffmann, E. G. Green and F. W. Lucas were on those days the *de facto* mayor and the *de facto* members of the common council of the defendant city; and J. F. Bailey, who also acted as a member of its common council on said days, was a *de jure* member of such common council, and that the bonds and coupons sued on are upon their face valid obligations of the defendant."

For the opinion of the Circuit Court on this point see Record, page 48.

William T. Jeter was mayor de jure and J. F. Hoffmann, E. G. Green and F. W. Lucas were members de jure of the common council of the city of Santa when the bonds in question were signed and ordered delivered and delivered to Messrs. Coffin & Stanton.

The old charter of the city of Santa Cruz, entitled "An Act to incorporate the Town of Santa Cruz," approved March 31, 1866 (Session Laws of California, 1865–6, p. 547), provided, among other things, as follows:

"SEC. 2. The corporate powers and duties of said body corporate shall be vested in a Board of Trustees, to consist of three members, who shall be elected by the qualified electors of said town on the *first Monday of May* of each year, and shall hold their offices for the term of one year, and until their successors are chosen and qualified; *provided*, that the first Board of Trustees shall be chosen in like manner at some time and place to be designated by the Board of Supervisors of the County of Santa Cruz, which time shall not exceed twenty days from the date of said order, and the Trustees so chosen shall hold their offices until the first Monday of May next ensuing, and until their successors are elected and qualified."

It appears from the legislation regarding the city that for ten years, to wit, from the time of the adoption of the said charter of 1866 to the time of the adoption of the new charter in 1876, the elections in the town of Santa Cruz were held on the first Monday of May, and the officers came into office on that date.

The new charter, entitled "An Act to reincorporate the City of Santa Cruz," approved March 11, 1876 (Session Laws of California, 1875–6, p. 189), provided, among other things, as follows :

"SEC. 3. On the second Monday in April, A. D. one thousand eight hundred and seventy-six, and biennially thereafter on the second Monday of April, a charter election shall be held, at which the legally qualified voters of said city shall elect the several respective officers as hereinafter provided, viz.: a Mayor and four Councilmen—one from each ward, who shall be electors of the wards from which they are chosen, which Mayor and Common Councilmen shall hold their office for two years, and until their successors are duly elected and qualified. There shall be elected at the charter election, held on the second Monday in April, A.D. one thousand eight hundred and seventy-six, a City Assessor, who shall be City Clerk, and a City Treasurer, who shall be City Collector, who shall hold their office for two years, and until their successors are elected and qualified, who shall be elected biennially thereafter. The officers of the present town government, shall continue in office, under this charter, with such powers and duties as are herein prescribed, until their successors are elected and qualified; and nothing herein contained shall be construed to release any person holding office in said town, from any personal liabilities which they may have incurred by any of their official acts."

Section 7 of the said charter provides, among other things :

"The Mayor and Common Council shall hold their regular meetings on the first Monday in each month."

The first Monday of May, 1894, was May 7, 1894, the date when the newly-elected officers actually entered upon the duties of their office (Findings of Fact numbered 9, Record, p. 22).

It further appears in the record in this case, by stipulation of the parties (Record, pp. 60 61), that W.

T. Jeter, as mayor, and J. F. Hoffmann, E. G. Green and F. W. Lucas, as councilmen, entered upon the duties of their offices on the *first Monday of May*, 1892; to wit, on May 2, 1892. The entry on the books of the common council of the city is as follows (Record, p. 61):

"CITY OF SANTA CRUZ, May 2, 1892.

"The *Mayor and common council elect*, having qualified as required by law, were conducted to their seats by the *retiring board*.

"Roll-call—present: His Honor, W. T. Jeter, Mayor; councilmen, F. W. Lucas, J. H. Bailey, F. J. Hoffmann, E. G. Greene and the clerk.

Approved.

WM. T. JETER,
Mayor.

Attest:
C. L. LINCOLN [O. J. Lincoln]
City Clerk."

The minutes of the preceding meeting, April 13, 1892 (Record, p. 61), show that on that date G. Bowman was mayor, and Finkeldey, Young and Drullard were members of the council, so that it appears from these records that W. T. Jeter, as mayor, and J. F. Hoffmann, E. G. Green and F. W. Lucas, as members of the common council, entered upon the duties of their office on the first Monday of May, 1892, *and not before.*

Section 3 of the charter of the city of Santa Cruz, above quoted, expressly provides "*which mayor and common councilmen shall hold their office for two years.*" Two years from the first Monday of May, 1892—May 2, 1892—would be the first Monday of May, 1894—May 7, 1894—or would be at least as late as May 2, 1894. William T. Jeter, therefore, was mayor *de jure*, and J. F. Hoffmann, E. G. Green and F. W. Lucas were councilmen *de jure*, down to May 7, 1894, or at least to May 2, 1894.

But if William T. Jeter was not mayor de jure, of the city and J. F. Hoffmann, E. G. Green and F. W. Lucas were not members de jure of the common council, they were at the very least mayor of the city and members of the city council, respectively, de facto, as was held by the Circuit Court. And this proposition was not denied by the Circuit Court of Appeals in its opinion.

It appears, in what is above stated, that the newly-elected officers of the city of Santa Cruz, elected the second Monday of April, 1894, not only did not actually enter upon the duties of their office until the first Monday of May, 1894, to wit, May 7, 1894, but also that in so doing these officers followed the time-honored custom which had been pursued from the first incorporation of the city, and no doubt they supposed that they were acting not only according to such custom, but according to law. The old officers were, therefore, on any theory, *de facto* officers of the city of Santa Cruz until May 7, 1894, and they acted as such officers in good faith and according to the established custom, and in the belief that they were lawfully so acting. This, therefore, is emphatically a case where the rules as to the acts of *de facto* officers of a municipal corporation apply with full force. Moreover, it will be observed that the city charter of the city of Santa Cruz, approved March 11, 1876 (Session Laws of California, 1875-6, p. 189), Section 3 of which is above quoted, does not expressly provide any particular time at which the term of office of the officers of the city shall begin. The language of the said section is, "shall hold their office for two

years," without saying two years from what time. It seems a very natural construction that, when this new charter was granted and this provision was made that the officers should hold their office for two years, this language was not construed to cut down the term of office of the officers elected under the old charter, who held their office until the first Monday in May. This seems especially appropriate in view of the express language of Section 3, as follows:

"The officers of the present town government shall continue in office, under this charter, with such powers and duties as are herein prescribed, until their successors are elected and qualified," etc.

We say, therefore, that this construction actually placed upon the charter of the City of Santa Cruz is a very natural and reasonable construction. Whether or not such construction was strictly justified in law by the terms of the charter, one thing is certain, and that is, that the officers of the city, in holding their office until the first Monday of May, to wit, May 7, 1894, were acting in good faith and according to what they believed to be the law, and according to the time-honored custom in the said City of Santa Cruz. They were, therefore, as above stated, at the very least, emphatically *de facto* officers of the said city, whose right no one disputed, and their acts during that time are binding upon said city as respects third persons, even if they were not officers *de jure*.

The question whether a person is a *de facto* officer depends upon the actual facts. Is he in the actual possession and exercise of the office? Jeter was in the actual possession and undisputed and public exercise of the office of mayor until May 7, 1894. A third person dealing with the city, as were Coffin &

Stanton, or as were any of these bondholders, would have learned, upon inquiry anywhere in Santa Cruz, that Jeter was actually in possession of the office, and that the various persons who assumed to act as councilmen were actually acting as councilmen until May 7, 1894. On no theory would Robert Effey, the newly-elected mayor, and the newly-elected members of the city council, be even officers *de jure* until they had qualified by taking the oath of office. This taking of the oath of office was not necessarily a public act. A stranger going to the city and having dealings with city officers, as did Coffin & Stanton, or as would any of the bondholders if they looked up the matter, would not know, or be likely to know, whether or not this oath of office had been taken. A stranger would look, and would have a right to look, to see who were, in fact, the actual incumbents of the office and peforming the duties. The answer to this question, and this alone, would decide who were the officers *de facto*, and when such strangers saw that Jeter was acting as mayor, and that certain members were actually acting as members of the council, he would be entitled to rely upon their acts as the acts of officers *de facto* of the city.

In *Dillon on Municipal Corporations*, 4th Ed., Section 276, it is said :

"In this country the doctrine is everywhere declared, that the acts of *de facto* officers, as distinguished from the acts of mere usurpers, are valid, and the principle extends not only to municipal officers generally, but also to those composing the council, or legislative or governing body of the municipality" (citing many cases, both English and American, in the notes).

This doctrine as to the validity of acts of *de facto*

officers is the doctrine in California, as the cases in that State, below cited in this brief, fully show.

The learned counsel for the city of Santa Cruz undertakes to make an argument that as respects the signing of the bonds Jeter could not be mayor *de facto*, because it is not shown that he signed these bonds in public. It seems hardly necessary to state that, if Jeter was actually in posession of the office of mayor and exercising its functions at the time when he signed the bonds, it is immaterial in what particular place the bonds were signed. Obviously the said bonds would not be signed in the public streets, nor is it at all necessary that they be signed in a place of public resort. It is entirely proper that they be signed in some safe and secure place. The only question is whether at the time of the signing the said William T. Jeter was publicly exercising the duties of the office of mayor. A purchaser of these bonds was not necessarily expected to be present and see each bond signed, much less see each bond signed in public. It is enough if they were signed on days when persons signing them were generally in the possession and exercise of the offices of the city. This is within the reason and foundation of the rule which justifies third persons in relying upon the acts of persons who are actually *de facto* in office. This rule applies to signatures on bonds as well as to other acts, as the following decision shows:

In the case of *County of Ralls vs. Douglass*, 105 U. S., 728, the action was brought to recover a judgment on interest coupons issued by said county. Mr. Justice WAITE, stating the opinion of the court, says the questions presented in this case are (p. 729):

"1. Whether, if county bonds are issued in Missouri by a *de facto* county court, and are sealed with

the seal of the court and signed by the *de facto* president, they can be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court."

On this point he says (p. 730):

"In no State is it more authoritatively settled than in Missouri that 'the acts of an office *de facto* (although his title may be bad) are valid, so far as they concern the public or the rights of third persons who have an interest in the things done.' In *State* v. *Douglass* (50 Mo. 593, 596), the Supreme Court of that State said: 'Without this rule the business of a community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business till every officer's right *de jure* was established.' To the same effect is *Harbaugh* v. *Winsor*, 38 *id.* 327. This is conclusive. The question here is not whether Dinmick was *de jure* probate judge of Ralls County, but whether he was acting under color or right as a justice and president of the county court. That is averred in the petition and not denied in the answer. His right to the office is one thing; his action while exercising the duties of the office, another."

The following cases show clearly that Jeter was at least *de facto* Mayor of the City of Santa Cruz at all the times in question.

In *The State of Wisconsin, ex rel. James H. Knowlton vs. John K. Williams*, 5 Wis., 308 (1856), the facts and decision are stated accurately in the head-note as follows:

"Where a governor continued to hold over, **after the expiration of his term, and after taking of the oath of office by his rightful successor,** on the assumption of his re-election, and under the certificate of the state canvassers, and so continued the acting governor, his approval of an act of the legislature was held valid, as the act of an officer *de facto*."

In *Carli vs. Rhener*, 27 Minn., 292 (1880), the facts were as follows, as stated by the court:

"Norgord was and acted as the judge of the municipal court of Stillwater for the two years prior to April 7, 1880. On that day Smith, who had been duly elected as his successor, **took the requisite oath of office** at five minutes after 11 A. M., and we may as well assume (what we understand to be the fact, though it does not appear as it ought to), that he immediately filed such oath in the office of the city clerk, as by law required, **so that he was duly qualified.** Norgord, between the hours of 11 and 12 of the same day, and after Smith had qualified, signed findings of law and fact in the case at bar, closing the same with a direction for judgment accordingly. * * * There is nothing to show that Smith in fact took possession of the office for which he had qualified, by exercising any of its functions or duties, until after the findings and direction had been signed and handed to the attorney for the successful party to be filed with the clerk.

Upon this state of facts, we are of opinion that the judgment was valid. * * * **Inasmuch as Smith had qualified,** he was *de jure* the judge, and Norgord's term *de jure* was, under the statute, at an end. * * * **But, as it in no way appears that Smith had taken possession of the office by exercising any of its duties or functions, Norgord, who was exercising its duties under the color spoken of, continued and was in possession of it.** His case is, therefore, that of an officer *de facto*—a person having and claiming color of title to an office by election or appointment, and in the exercise of its functions and duties; that is to say, in possession of it. The acts of such an officer are valid as respects the public and persons interested therein, and as to them cannot be questioned" (citing numerous cases).

In *Magneau vs. Fremont*, 30 Neb., 843, objection was made against the validity of a certain ordinance, on the ground that there was not present a quorum of legal members of the city council of Fremont, and that the prescribed number of legal members of that body did

not vote in favor of the passage of the ordinance. The Court says concerning these objections (p. 846):

"It is conceded that all who participated at the meeting when the ordinance was adopted were legal members of the council, except Peterson and Lowry, whose right to act is questioned, on the ground that their successors had previously qualified on April 7. The statute requires that two-thirds of all the members of the council shall be necessary to constitute a quorum for the transaction of business. It is obvious that if Peterson and Lowry could not lawfully act with the council at that meeting, no quorum was present and the ordinance is invalid.

"Section 12 of article 2, chapter 14, Compiled Statutes, provides that in cities of the second-class having more than 5,000 inhabitants there shall be elected annually in each ward one councilman, who shall hold his office for a term of two years, and until his successor shall be elected and qualified. There being no statutory provision fixing a particular date when the term of office of a councilman shall begin, it is believed that the provisions of said section 12 control and that the term of such officer commences immediately after the person elected has qualified.

"**While Morse and Hein had qualified,** they had not, as yet taken their seats in the council, or participated in the proceedings of that body. The names of Lowry and Peterson appeared upon the roll of members, and they were recognized as such by other members of the council, as well as by the mayor and city clerk. They took part in the proceedings of the council on April 9th without objection from any one, although Morse and Hein were at the time in the council chamber. We conclude, therefore, that Messrs. Morse and Hein were *de jure* officers and that Lowry and Peterson were *de facto* members of the city council.

"The cases are numerous which hold that the acts of a *de facto* officer, so far as they involve the interests of the public or third persons are as valid and binding as though he was an officer *de jure*. * * * * * *

"It follows from the reason of these cases that the acts of Lowry and Peterson are valid, and that there was a quorum of the city council present at the time the ordinance was adopted."

In *Hamlin vs. Kassafer*, 15 Oregon, 456, the Court states the facts as follows (p. 457):

"One E. D. Foudroy had been elected justice of the peace for the precinct of Jacksonville, at the general election in 1884, and had entered upon the discharge of the duties of his office; that at the general election in 1886, Foudroy was again a candidate for that office, but was defeated by one G. A. Hubbell, who **received the certificate of election and duly qualified,** and that he demanded of the said Foudroy the possession of said office, its docket, and books thereunto belonging, but that Foudroy refused to surrender the same, and continued to exercise and perform the functions of the said office; that, thereafter, and at the time of the rendition of the said judgment by the said Foudroy, he was in possession of said office in which he had held court as a justice of the peace," etc.

The Supreme Court therefore held that Foudroy was a *de facto* officer, and that the judgment obtained before him while he was such *de facto* officer was valid.

In *Brown vs. Lunt*, 37 Maine, 423 (1854), a justice of the peace took an acknowledgment of a deed after his commission had expired. It was proved that he constantly and frequently acted as justice of the peace after his commission had expired, and on these facts the Court held that he must be regarded as a justice of the peace *de facto* when he took the acknowledgment of the deed in question, and that therefore such acknowledgment was valid.

In *Petersilea vs. Stone*, 119 Mass., 465, one Farr was exercising the office of constable, and as such constable served a notice to take the poor debtor's oath. Farr had been for several consecutive years a constable in Boston, duly qualified to serve, and serving civil process, and was generally known as such, and held himself out as such. The notice in question was served after the expiration of his term, but while he

still was acting as a constable. The court held that he was constable *de facto*, DEVENS, J., giving the following opinion (p. 467):

"If Farr was an officer *de facto*, the validity of the service by him of the notice to take the poor debtor's oath cannot be inquired into collaterally. *Coolidge* v. *Brigham*, 1 Allen, 533. In order to show that he was not, the plaintiff relies upon the statement of BIGELOW, C. J., in *Fitchburg Railroad* v. *Grand Junction Railroad*, 1 Allen, 552, 557, that 'the exact distinction between an usurper or intruder, and an officer *de facto*, is this: the former has no color of title to the office; the latter has, by virtue of some appointment or election.' If this were intended as a general definition of an officer *de facto*, it would be incomplete, but the inquiry there presented to the court was as to the validity of certain acts done by one who acted under a commission *prima facie* valid, and issued by an authority apparently empowered to invest him with the legal rights and powers of the office to which he was appointed, and it is to be limited to the case then before the court. The reason of public policy, upon which it is held that the acts of an officer *de facto* are not to be called in question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. This principle has been applied in England to the most important office; after Edward IV. obtained the crown, the kings of the line of Lancaster, who had preceded him, were spoken of as '*nuper de facto et non de jure reges Angliæ*', but although Henry VI. had been declared a usurper by act of Parliament, attempts against his authority (not having been in aid of the rightful king) were capitally punished. 1 Bl. Com. 204. 4 Bl. Com. 77. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question (*Brown vs. Lunt*, 37 Maine, 423; *State* vs.

Carroll, 38 Conn., 449*)*. If the party thus recognizing the officer *de facto* were aware that such officer had some appointment or election, it would strengthen his belief, but without this he would be justified in believing that an authority publicly exercised and assented to was rightfully assumed *(Wilcox vs. Smith*, 5 Wend., 231*)*. The definition of an officer *de facto*, as given by Lord ELLENBOROUGH, in *The King vs. Bedford Level*, 6 East, 356, which he generalizes from that of Lord HOLT, in *Parker vs. Kett*, 1 Ld. Raym., 658, 660, is 'one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law,' and the above suggestions are in accordance with this definition. In the opinion in *People vs. Collins*, 7 Johns., 549, relied on by the plaintiff, it is held that the commissioners, whose acts were there in question, were officers *de facto*, as they came into their office by color of title; and it is added that 'it is a well settled principle of law that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done.'

"The principle, upon which the acts of officers *de facto* have been held valid, has sometimes been extended, so far as to protect them, under certain circumstances, when they have been directly proceeded against. The question then presented is not the same as that where the rights of third persons only are involved, and in such cases it would not be sufficent that they had publicly exercised such office, but they might properly be called upon to show they did so by virtue of some appointment or election, which they had a right to believe valid, even if it were otherwise *(State vs. Carroll, ubi supra)*.

"It was shown in the present case that Farr was 'notoriously acting' as constable, having an office in Boston, and upon its door his name with the addition of the word 'constable'; and, as to third persons, he must be deemed an officer *de facto*.

"Were it necessary, in order to maintain his proceeding, to show that he had color of title by some appointment or election, it would not, perhaps, be difficult to do so. Farr had originally a proper appointment, and even if he, who wrongfully holds over after the term for which he is appointed has expired, and this is known to him, cannot be said to hold by color of title, there are many cases where this expiration cannot be clearly ascertained. He who thus

continues to hold his office erroneously, but under a claim of right, honestly and reasonably made, has color of title from his original appointment or election (*Crew vs. Vernon*, Cro. Car., 97). These considerations have rendered it unnecessary to determine whether Farr was an officer *de jure*.

"*Judgment affirmed.*"

See, also, *Attorney-General vs. Crocker*, 138 Mass., 214. In this case the Court held that a certain town clerk was a *de facto* officer, whether or not he had ever had any valid appointment. The Court, in concluding its opinion, says (p. 222):

"The public and parties, having rights depending upon official acts, are not so much concerned with the title to an office, as they are that the duties of the office shall be performed, and the rights depending upon their performance secured and protected; and when they find an *actual incumbent of an office performing its duties*, they have a right to rely upon his acts as done by virtue of the office."

In *Galbraith vs. McFarland*, 3 Coldwell (Tenn.), 267, the facts and decision are stated accurately in the head-note, as follows:

"An act performed by a Clerk of the Circuit Court, after the term for which he was elected has expired by its own limitation, is valid. He was an officer *de facto*, and his official acts, so far as they affected the rights of third persons and the public, are as effectual and valid as if performed by an officer *de jure*."

5 *American and English Encyclopædia of Law* (1st Edition), p. 105, cited by the learned counsel for the city of Santa Cruz, expressly says:

"One holding after his term of office has expired, may be a *de facto* officer" (citing numerous cases).

The Supreme Court of Michigan, in *Johns vs. The People*, 25 Mich., 499, said (p. 503):

"Persons in the *actual and unobstructed exercise* of office must be held to be legal officers, except in proceedings where their official character is the issue to be tried as against themselves. As intimated in the latter case, *the title to office can never be tried collaterally.*"

State of Kansas vs. Buckland, 23 Kansas, 259, was a direct *quo warranto* proceeding to oust Buckland from the office of justice of the peace, and he was ousted. HORTON, C. J., states the facts as follows (p. 261):

"It appears from the agreed statement of facts that Buckland and Goit were each candidates at the general election in November, 1877, for the office of justice of the peace of Great Bend township; that the proper board of canvassers duly declared Goit elected to the office and issued to him a certificate of election; that he filed his official bond and oath of office at the time and in the manner prescribed by law."

Buckland, however, held over and continued in possession of the office until the issuance of the writ of *quo warranto*, which ousted him, as above stated.

In the later case of *Morton vs. Lee*, 28 Kansas, 286, it appears that judgment was rendered before the said Buckland, as justice of the peace (the same Buckland who was ousted in *quo warranto* in the case of *State of Kansas vs. Buckland*, 23 Kansas, 259, (above mentioned), and the sheriff made a levy under said judgment. The suit was to enjoin the sheriff from collecting the judgment. The court, giving the opinion, said (p. 288):

"After the issuance of the certificate of election to Goit he was a *de facto* officer only, for though he was not a good officer in the point of law, yet he had the possession of the books, papers and records of the office of justice of the peace, and continued to act as a justice of the peace until the rendition of the judgment in this court, and was recognized by a part of the public where he held the office as a justice of the peace of the township. His acts, while acting as a justice of

the peace *de facto*, upon principles of policy and justice, must be held valid so far as they involve the interest of the public and third persons.

"Some of the special findings of the trial court seem to conflict with our opinion that Buckland was a *de facto* officer at the time of the rendition of the judgment attempted to be enjoined; but we think that the evidence in the record clearly establishes the position we have taken. The finding that Buckland was generally recognized as a justice of the peace of Great Bend township by a portion of the public at the time of the rendition of the judgment of June 28, 1879, and that he had not been ousted by the process of any court after his qualification under his original appointment at the time of the rendition of such judgment justifies our conclusion. (2 Kent's Com. 295; 1 Abbott's Law Dict. 343; *State* v. *Carroll*, 38 Conn. 449–479; *Braidy* v. *Theritt*, 17 Kas. 468; 19 Am. Decisions, 61.)

"'The reasons of public policy upon which it is held that the acts of an officer *de facto* are not to be called into question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. * * * Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to say that he has color of title to it by virtue of some appointment or litigation. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such should not be subjected to the danger of having his acts collaterally called into question' (*Petersilia vs. Stone*, 119 Mass., 467).

"While the acts of officers *de facto* are valid and binding as to the public and third persons from considerations of public policy, yet as to the person exercising the duties of the office they are invalid, and afford him no protection whatever."

County of Wapello vs. Bigham, 10 Iowa, 39, was an action on a bond given by a surety of the treasurer of the county. The treasurer held over, and the court stated that he was a *de facto* officer. The main point in the case was, however, that the surety was not

liable on the bond except for the term for which it was given, and the court added that the law was the same "though the officer be re-elected to the same office."

In the case of *In Re Manning*, 139 U. S., 504, the writ of error was addressed to the Supreme Court of the State of Wisconsin to review a judgment of that court denying to Manning a writ of *habeas corpus*. The writ was applied for on the ground that the person who assumed to act as judge, and before whom Manning was tried, convicted and sentenced to imprisonment for manslaughter, was not a judge. This Court held, following the Supreme Court of Wisconsin, that he was at least judge *de facto*, and that the sentence and imprisonment were not a violation of the constitution of the United States.

In *Ball vs. United States*, 140 U. S., 118, it was alleged that Judge BOARMAN, in holding court in Texas, was not a judge, hence the sentence was invalid, but the Supreme Court, Mr. Chief-Justice FULLER giving the opinion, says (p. 128):

"We are of opinion that the irregularities alleged did not place Judge BOARMAN, in holding the October term, in any other position than that of a judge *de jure*, and that as to the April term, he was judge *de facto* if not *de jure*, and his acts as such are not open to collateral attack."

California holds the same doctrine as held elsewhere as to the validity of acts of de facto officers.

Thus *People v. Hecht et al*, 105 Cal., 621 (1895) was a proceeding by *quo warranto*, brought in the Superior Court, to determine by what authority the defendants, as individuals or as a board, were acting as a board of

fifteen freeholders to prepare and propose a charter for the city and county of San Francisco. The complaint averred, among other things, that the defendants were not and never had been a legally constituted board of fifteen freeholders, but had usurped the functions of said board, &c.; that no board was chosen by the voters, for the reasons that two of the persons elected were not eligible because they had not been for at least five years qualified electors of said city and county, as provided by the Constitution.

The Court held that "the defendants Hellman and Bourn, not having been for at least five years qualified electors of the City and County of San Francisco, were ineligible to the office of freeholder;" but that "the remaining thirteen members, who were regularly elected, constituted a legal board, with authority to act."

The Court discussed the subject of *de facto* officers as follows:

"Again, the office of freeholder is created by the Constitution. It is a *de jure* office. When Hellman and Bourn were elected by a plurality of the qualified electors, received their certificates of election, and qualified and participated in the action of the board, they were then under color of office and presumptively entitled to the office. They were *de facto* officers in the discharge of the duties of a *de jure* office, and as such their acts while they remained such were as valid and binding as those of *de jure* officers. There must be a *de jure* office to be filled before there can be a *de facto* officer.

"If the former exists, and the latter holds it under and pursuant to a regular Commission purporting to empower him to act, his acts in such office, until his right thereto is judicially determined, the law holds upon principles of policy and justice to be valid so far as they involve the public and third parties, notwithstanding the personal liability of the incumbent for intruding into such office. * * *

"We reach the following conclusion: [1. That the thirteen freeholders were competent to organize and act as a board].

2. J. W. Hellman and William B. Bourn were not eligible to the office of freeholder, and, although regularly elected and commissioned, are not *de jure* officers of the board; 3. Said Hellman and Bourn having been elected and commissioned, became *de facto* members of the board, and as such their acts were and are valid as to the public and third parties."

So, also, in *People vs. Sehorn*, 116 Cal., 503 (1897), the defendant was charged by the information with murder, and was convicted of manslaughter. It was contended, on appeal, that on account of alleged defects in the preliminary proceedings before the committing magistrate, defendant's motion to set aside the information should have been granted.

The Court said, on the question of the power of the committing magistrate to act:

"It is contended that Jansen, who was called in to conduct the preliminary examination, was not a justice of the peace, and could not legally commit the defendant. The facts upon which this contention is made are these: After Jansen had been appointed justice of the peace of the second judicial township the board of supervisors of the county undertook to change the boundaries of the township in such a manner as to make him a non-resident thereof. It is somewhat doubtful, upon the record, whether any valid order was ever made changing the boundaries of said township, but, assuming that it was legally made, and that thereafter the said Jansen was not a resident of the township as thus changed, still he continued to act as such justice and to do business as the justice of said township. No other person was appointed to fill said office, and he continued to perform the duties of said office up to and during the said preliminary examination. He never was ousted from said office by *quo warranto*, or any other similar proceeding. He was, therefore, a *de facto* justice of the peace of said township, and his right to exercise the functions of his office cannot be questioned in this or any

other collateral proceeding. (Throop on Public Officers, secs. 625, 631, and cases there cited; People v. Roberts, 6 Cal. 214; Case v. State, 59 Ind. 46; Woodside v. Wagg, 71 Me. 207; Sheehan's Case, 122 Mass. 445; 23 Am. Rep. 374; People v. Hecht, 105 Calif. 621; Hull v. Superior Court, 63 Calif. 177.)"

S. P. *Buck vs. City of Eureka*, 109 Cal., 504, as to validity of acts of *de facto* officer.

CASES AS TO DE FACTO OFFICERS CITED BY COUNSEL FOR CITY OF SANTA CRUZ, NOT APPLICABLE.

The learned counsel for the city of Santa Cruz cite certain decisions of various courts.

The case of *Trinity Co. vs. McCammon et al.*, 25 Cal., 117, was *a direct proceeding against an officer, enjoining him from acting after his successor had been elected and qualified;* and the court, of course, held that against him, in that direct proceeding, he was only a usurper. That was not a case where the person had acted as an officer *de facto*, and where the rights of third persons were involved.

Becker vs. People ex rel. Wilson, 156 Ill., 301, was, as is shown by the title of the case, *a direct proceeding to oust certain persons from office.* Of course, it has no bearing on the question whether a person is or is not a *de facto* officer.

The case of *People ex rel. Harris vs. Brenham*, 3 Cal., 477, cited by the counsel for the city of Santa Cruz, was a direct proceeding in *quo warranto* to try title to the office, and, of course, did not involve any question of anyone's being *de facto* officer.

Connolly vs. Ashworth, 98 Cal., 205, was an appeal to the Supreme Court from the judgment of the Superior Court. The judgment appealed from had been

filed with the clerk of the Superior Court after the judge who had rendered the decision had ceased to be judge *de jure* or *de facto*. In other words, he had vacated and actually gone out of office before the decision was filed with the clerk. The Supreme Court, *on direct appeal from this very judgment* so filed with the clerk, reversed the judgment, holding that, at the time it was filed, the person whose name it bore as judge was not judge, either *de jure* or *de facto*.

In *Broder vs. Conklin*, 98 Cal., 360, the facts were that a motion was made in the lower court to set aside a judgment, which motion was granted on the ground that the person who, as judge, had mailed the judgment to the clerk, had ceased to be judge before the judgment was filed. This was *a direct attack upon the judgment*, by motion, to set it aside, which was accordingly done, and the Supreme Court of the State, of course, affirmed the decision of the lower court setting the judgment aside.

People, ex rel. Morton, vs. Tieman, 8 Abbott's Practice (N. Y.), 359, was an application by the relator for writ of mandamus to compel the drawing of a warrant to pay the relator the salary of city inspector from the first day of January, 1859, at which time his office had expired, and since which time he had been holding over. Of course the writ was refused, as a *de facto* officer cannot claim salary unless he is also a *de jure* officer. He is not an officer as to himself, but as to third persons and the public.

In *Boardman vs. Halliday*, 10 Paige, 223, the question was whether a certain person was *de facto* in the exercise of the office of a deputy of the then existing sheriff, and the court merely held that there was not

sufficient in the facts to enable it to say that he was. The court says (p. 233):

"I am not prepared to say Poppino might not have been considered a deputy of the under-sheriff, in the present case, *de facto*, so as to render his acts valid as to third persons, if it had distinctly appeared that he was professedly acting as a deputy of the under-sheriff, and with his knowledge and consent."

In *Williams vs. Boynton*, 147 N. Y., 426, the action was to have certain proceedings of the Board of Supervisors of the county declared illegal and void, and to restrain certain other official acts. This was *a direct proceeding*, and in this proceeding the court held that a certain person who assumed to be supervisor was not supervisor. The court said it was not a case for the application of the doctrine which applies to *de facto* officers, saying (p. 432):

"No private individual had acquired any right upon the faith of the resolution, and before the public had or could acquire any, the validity of the action was challenged, and the very office of the injunction was to stop the incomplete and inchoate act so as to prevent either individuals or the public from being in any manner affected by it. But if the doctrine had any proper application it is still true that Sullivan was not a *de facto* officer, because, when he cast his vote, he had no color of title and was a mere usurper and intruder."

In *Edison vs. Almy*, 66 Mich., 329, (s. c., 9 West. Rep., 730) the action was brought on a judgment rendered by a justice of the peace after his term of office had expired. The defendants did not appear before the justice of the peace, having previously notified plaintiff's attorney that they would not do so on account of Holcomb's ceasing to be justice. The court, of course, held the judgment void.

Becker vs. The People, 106 Ill., 301, was also a direct

proceeding to try title to the office by *quo warranto*.

In *State vs. Carroll*, 38 Conn., 449 (1871), the question involved was whether a certain Mr. Morse was a judge, so that his acts were valid. The court held that he was at least a judge *de facto*, and that, therefore, his acts as judge were valid. That was not a case of an officer holding over, and the court did not decide or even discuss any question as to whether an officer holding over might or might not be an officer *de facto*. No such question was before the court.

In *School District vs. Smith*, 67 Vermont, 566, cited by the learned counsel for the city of Santa Cruz, the court says (p. 568):

"Huse was not, therefore, legally elected. But it is said that he was treasurer *de facto*. But the defendant was in actual possession of the office; and an officer *de jure* and an officer *de facto* cannot both be in possession of the same office at the same time."

Vogel vs. State of Indiana, ex rel. Land, 107 Indiana, 374; s. c., 5 West. Rep., 546, was a direct proceeding, by information, to try title to the office in question.

In *Burke vs. Elliott*, 4 Iredell (N. C.), 355, the court expressly held that the officer there in question was an officer *de facto*, and that his acts were as effectual, as far as the rights of third persons or the public were concerned, as if he was an officer *de jure*.

The same thing was also held by the same court in the case of *Gilliam vs. Reddick*, 4 Iredell, 368.

In the case of *State vs. Lewis*, 107 N. C., 967, cited by the learned counsel for the city of Santa Cruz, the officer there in question had ceased by his own act, and by his express declaration to that effect, to be a judge, and he was not, therefore, a *de facto* judge.

In the case of *Hughes vs. Long*, 119 N. C., 52, cited by the learned counsel for the city of Santa Cruz, the court says, respecting the officer there in question (p. 56):

"In the present case, there is no proof nor any attempt to prove that Douglass Williams, for a period of nearly two years after his commission expired, attempted any act as a notary public, until in the present case, nor does it appear in any manner that he was recognized in the community in which he lived as such an official."

In the case of *Coler vs. Cleburne*, 131 U. S., 162, the bonds there in question on their face purported to have been executed on January 1, 1884. They were, in fact, executed and delivered on July 3, 1884. They were signed by W. N. Hodge, a private citizen, but formerly mayor of the city, whose term of office had expired in April, 1884. J. M. Odell, who was elected mayor in 1884, was the legally-qualified and *acting* mayor of the city on July 3, 1884. The court, therefore, held that the bonds had not been signed by the mayor. W. N. Hodge was not the acting or *de facto* mayor of the city. J. M. Odell was actually and *de facto* and *de jure* mayor on July 3, 1884, and he had at all times refused to sign the said bonds.

The case of *Coler vs. Cleburne* is not like the present case, for in the present case these bonds were nearly all of them signed by William T. Jeter as mayor, while he was clearly mayor both *de jure* and *de facto*, and the remainder were signed while he was clearly *de facto* mayor. Furthermore, all of said issue of bonds signed by him were delivered under the order of the city counsel and by the city clerk. In other words, all of the then existing officers of the city joined in delivering these bonds as the bonds of the city.

Judge DE HAVEN, before whom the present case was tried, says, in his opinion, concerning *Coler vs. Cleburne* (Record, p. 49):

"That case is not authority for the proposition that the action of a *de facto* officer in signing bonds would not be as binding upon the municipality for which he assumes to act as that of an officer *de jure*; and it seems clear to me that if Jeter was the *de facto* mayor when he signed the bonds sued on, then such signature by him was a compliance with the ordinance requiring them to be signed by the mayor; and so, also, if he was *de facto* mayor, and those assuming to act as the common council of the defendant were *de facto* members of the common council at the time when he and they assumed as mayor and common council to accept the proposition of Coffin & Stanton in relation to the bonds, and directed their delivery to that firm, then such acts upon their part are to be treated, so far as concerns the public and third persons having an interest in what was done by them as the acts of the *de jure* mayor and common council of the city."

The city of Santa Cruz took certain exceptions as to the admission of evidence respecting the question whether or not Jeter and others were officers of the city, at least *de facto*. It is not necessary to consider those exceptions to the admission of evidence separately, as substantially the same question arises on the findings of fact.

But even if it be supposed that when William T. Jeter signed some of these bonds now in question on the 16th day of April, 1894, he was not de facto mayor (we have, however, clearly shown above that he was such de facto mayor), still it is not open to the city of Santa Cruz to make any defense to these bonds as respects such signature. These bonds bore

date April 16, 1894, when Jeter was clearly Mayor de jure and de facto ; they were sealed with the city seal, and attested by the city clerk. Said clerk, O. J. Lincoln, was clearly clerk both de jure and de facto during all of the times in question. These bonds were ordered delivered by the city council, and were delivered by the city clerk as the bonds of the city (Finding of Fact, No. 11, Record, p. 23).

The precise point as to Jeter's signature being valid and binding upon the city under such circumstances, even if he was not a *de facto* officer, has been expressly determined by this Court in the case of *Town of Weyauwega vs. Ayling*, 99 U. S., 112. In that case the Court said (p. 117) :

" As printed, the bonds bore date June 1, 1871. At that time Fenelon was chairman and Verke clerk. The signatures of these officers were lithographed and printed on the coupons. Before the bonds were actually signed by Verke, he had resigned his office and moved out of the town. Another clerk had been appointed and qualified in his place. Apparently to save the expense of new lithograph and another printing of the bonds, Verke, after going out of office, affixed his signature to those which had been printed. These bonds so signed by Verke and by Fenelon, who actually was chairman at the time, were taken by Fenelon and delivered to the railroad company. This having been done, Ayling, the defendant in error, purchased the bonds to which the coupons sued on were attached, and paid their full value without notice of any claim of defence to their due execution. Under these circumstances, we think the town is estopped from proving that Verke in fact signed the bonds after he went out of office. If Ayling had put himself on inquiry when he made his purchase he would have found, 1, that the town had authority to vote the bonds ; 2, that the necessary vote had been given ; 3, that at the date of the bonds Verke was clerk and

Fenelon chairman; 4, that their signatures were genuine; and, 5, that the bonds had actually been delivered to the railroad company by Fenelon, who was at the time chairman. If a bank puts out a note for circulation bearing the signature of one who was in fact president of the bank when the note bore date, no one will pretend that it could be shown as a defense to the note when sued upon by a *bona fide* holder, that the signature of the person purporting to be president was affixed after he went out of office. So, if one puts out a note purporting to be signed by himself, but which was in fact signed by another having at the time no authority from him, he cannot prove the forgery or want of authority in the signer as against a *bona fide* holder. The reason is obvious. The bank by issuing the note, and the individual by delivering the paper which purported to be his obligation, adopted what they thus put out as their own, and became bound accordingly."

L.

The Polls at the bond election were kept open as required by law.

Section 1 of the refunding bond act of March 1, 1893 (Session Laws of California, 1893, p. 59), provides:

"Said election shall be called and held in the same manner in which other elections are held in such city or town".

Section 5 of the Charter of the city of Santa Cruz (Session Laws of California, 1875-6, p. 189, 191) provides:

"SEC. 5. It shall be the duty of the Mayor and Common Council to call all city elections, to designate the time and place of holding the same—giving at least ten days' notice thereof—and for each ward they shall appoint one Inspector and two Judges of Election, residents of their respective wards, who, together with two clerks to be appointed by them, shall take the oath of office prescribed by law for Inspectors,

Judges, and clerks of State and county elections, and all provisions of law regulating elections for State and county officers shall apply, as far as practicable, to elections under this charter. The polls for all elections shall be opened at nine o'clock A. M., and shall not be closed until sundown of the same day. In case any of the officers so designated shall fail to attend, those attending, with the electors assembled, shall fill their places by appointing other competent persons from among the qualified electors present; and all returns of city elections shall be made out and signed by the officers of such election, in the usual form, and deposited with the City Clerk, and the persons having the plurality of the votes cast for each of the respective officers voted for shall be declared duly elected; and no person who is not a qualified voter shall be eligible to any office under this charter, nor shall any person be entitled to vote at any city election, unless he be an elector for State and county officers, and shall actually have resided within the ward in which he claims his vote thirty days next preceding such election."

The *Political Code* of California, as amended by an act approved March 20, 1889 (Session Laws of California, 1889, p. 423), provides (p. 425):

"1160. The polls must be opened at sunrise of the morning of the day of election, and must be kept open until five o'clock on the afternoon of the same day, when the polls shall be closed."

The Political Code of California, as amended in 1889, long after the adoption of the charter of the city of Santa Cruz, found in the session laws of California, 1875–6, thus expressly provided that in all elections the polls should be closed at five o'clock. This general law contained in the Political Code controlled the charter of the city. See on this subject the cases cited on this brief, pages 234–239.

Even if it were true that the polls were not kept open at the election for a proper

length of time, yet they were kept open substantially the required time, and any irregularity in this respect is immaterial so long as it not shown that it changed the result of the election.

In Dillon on Municipal Corporations, 4th Ed., Vol. I., § 197 note, the author says:

"It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election" (citing numerous cases).

In *People vs. Prewett*, 124 Cal., 7, it was contended that a school election was invalid, on the ground that the polls did not open until one-half hour after the appointed time. The statute required the polls to be open not less than four hours. The notice stated that they would be open between the hours of one p. m. and five p. m. As a matter of fact they did not open until about one thirty. The court held the election valid, saying (p. 11):

"There is no claim that any one was prevented from voting either because of the notice or because the polls were kept open a little less than four hours."

The learned counsel for the defendant The City of Santa Cruz in their brief before the United States Circuit Court of Appeals, undertook to make an argument to the effect that by the polls being closed at five o'clock, instead of being kept open until sundown (see Finding of Fact by the Court, Record, p. 33), a large number of voters in the city of Santa Cruz were unjustly deprived of their right to vote. This argument is utterly without foundation. As we have already seen, the general law contained in the political code,

Section 1160, as amended in 1889, expressly provides that the polls shall be closed at five o'clock. Not only so, but the notice of election expressly provided (Record, p. 38):

"The polls of such election shall be opened at sunrise in the morning of said day of election, and shall close at five (5) o'clock p. m. of the same day."

Any and all voters of the city of Santa Cruz were thus specifically notified that the polls would close at five o'clock. They had all day, from sunrise in the morning until five o'clock in the afternoon, in which to vote, and in view of this express provision in the political code, and this express provision in the published and posted notice of election, that the polls would open at sunrise and close at five o'clock, it is preposterous to argue that any voter in Santa Cruz was unjustly or illegally deprived of his right to vote. There is nothing in the findings of fact in the present case, nor is there the slightest evidence in the record (even if evidence could be resorted to, as it cannot), to show that there was not a full, free and fair vote by the qualified voters of the city of Santa Cruz, or that a single voter in the city was deprived of his vote by the polls closing at five o'clock, instead of closing at sundown, even if that were the law.

Furthermore, no one in the city of Santa Cruz questioned in any way the legality of this election until after these negotiable refunding bonds were put out, although all of them knew that these refunding bonds, with their recitals, were to be issued, and might come into the hands of innocent holders. The city cannot be heard at this late day to question the validity of this election.

But even if it were true that the charter provision that the polls should be kept open until sunset was the one that governed, and not the later provision in the political code, Section 1160, as amended in 1889, then the recital in the bonds in question in the present case (Record, p. 5), that this election was " duly and legally called and held and conducted in said city as provided under said act " (the refunding act), is conclusive in favor of the bona fide holders of these bonds, and the city is estopped from making any such defense as that the polls were closed too early.

For this proposition it is unnecessary to cite decisions. See, however, the cases cited on this brief, pages 244, 245.

M.

There is no question of over-issue of bonds involved in the present case.

The learned counsel for the City of Santa Cruz, in their brief in the United States Circuit Court of Appeals, undertook to make an argument that the bonds and coupons in question in the present case are invalid on the alleged ground that they constitute an over-issue. Any such argument is clearly erroneous, for the following reasons:

There is no limitation in the constitution of California as to the amount of bonds that may be issued by a municipality, so long as there is a vote of the people had for such issuance, and so long as provision is made for the collection of an annual tax sufficient to pay the

interest and constitute a sinking fund, both of which conditions were complied with in respect of the present issue of bonds.

The constitution of California (Article XI., Section 18, as amended by Assembly Constitutional Amendment No. 7, Session Laws of California, 1891, p. 523) provides as follows (p. 524):

"SECTION 18. No county, city, town, township, Board of Education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void."

The bonds in question in the present case are refunding bonds, issued under the act of March 1, 1893. Neither that act nor any other statute of California prescribes any limit as to the amount of refunding bonds that may be issued.

The provision in the said act of March 1, 1893 (see the act printed on this brief, p. 3), authorizes cities to refund "outstanding indebtedness evidenced by bonds and warrants thereof." No limit is placed upon the amount of such refunding bonds that may be issued. The argument of the learned counsel for the city under this point amounts to this proposition—namely, that the original bonds which were refunded by the bonds now in question were not bonded

indebtedness of the city, but no such proposition or argument as this can be made by the city against the validity of the present bonds, for those bonds expressly recite that they are

" issued by the said City of Santa Cruz for the purpose of refunding the *bonded indebtedness of said city*, and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act * * * approved March 1, 1893 " (reciting in full the title of said act).

See on this point the numerous cases decided by the Supreme Court of the United States, cited in this brief under Point I., pages 40 to 79.

Limitations in Public Improvements Bond Act relate only to bonds for public improvements, and that act does not limit amount of refunding bonds.

The learned counsel for the city cites the provisions of the act approved March 19, 1889 (Session Laws of California, 1889, p. 399), as amended by the Act of March 11, 1891 (Session Laws of California, 1891, p. 84). Section 5 of the said Act of March 19, 1889, is as follows :

" SEC. 5. No city, town or municipal corporation shall incur an indebtedness *for public improvements* which shall in the aggregate exceed *five* per cent. of the assessed value of all the real and personal property of such city, town or municipal corporation."

This section was amended by said Act of March 11, 1891, so as to read as follows :

" SECTION 5. No city, town or municipal corporation shall incur an indebtedness for public improvements which shall in the aggregate exceed *fifteen* per cent. of the assessed value of all the taxable real estate and personal property of such city, town or municipal corporation."

The subject matter of the said act of March 19, 1889, relates exclusively to public improvements and bonds issued for public improvements. The said Section 5, as it appears in the said original act of March 19, 1889, and also as it appears in the said amendatory act of March 11, 1891, places a limitation only upon "indebtedness for public improvements." The said act of March 19, 1889, does not deal, or profess to deal, in any manner with the issuance of refunding bonds, nor undertake to place any limit upon the amount of refunding bonds that may be issued. Any one examining the statutes of the State of California for the provisions of the law relating to the issuance of refunding bonds would not find anything in the said act of March 19, 1889, as amended by the act of March 11, 1891, making any limit whatever upon the amount of refunding bonds that might be issued, nor any provisions whatever as respects refunding bonds.

The Refunding Act and the Public Improvements Bonds Act are wholly independent Statutes, as has been expressly decided by the Supreme Court of California.

The case of *City of Los Angeles v. Hance*, 122 Cal., 77, involved this precise question. Chapter 82 of the Session Laws of California, 1897, provided (Section 4):

"Chapter eighty-two of the statutes of eighteen hundred and eighty-three, chapter forty-eight of the statutes of eighteen hundred and ninety-three and chapter one hundred and seventy-six of the statutes of eighteen hundred and ninety-five, all being laws of the State of California in conflict herewith, are hereby repealed."

The title of Chapter 82 of the Laws of 1897 is as follows:

"An Act authorizing the Common Council, Board of Trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, to issue bonds therefor, and to provide for the payment of the same."

Chapter 48 of the Statutes of 1893 (which the said Section 4 of Chapter 82 of the Laws of 1897 undertook to repeal) was an act amending Section 6 of the Act of March 19, 1889, relating to the issue of *bonds for municipal improvements.* On these facts the Court expressly held that the said Chapter 48 of the Statutes of 1893 was in full force and unrepealed. The Court said (p. 78):

"*The subject of the repealing act*, as expressed in its title, *is entirely foreign to the subject of the section attempted to be repealed*, and the question to be determined is, whether an act, or part of an act, can be repealed when the title of the repealing act announces no such intention, and *when the repeal of the existing law would have no effect one way or another upon the operation of the new law.*

We think it very clear in such a case no repeal is effected, because the repealing clause is in conflict with that part of section 24 of Article IV of the constitution, which reads as follows: 'Every act shall embrace but one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title.'"

The act entitled "An act authorizing the incurring of indebtedness by cities, towns or municipal corporations, incorporated under the laws of this State," approved March 15, 1887, which act is mentioned in Ordinance No. 314 (Additional Finding of Fact No. 1, Record, p. 26) as the act under which were issued $225,000 original water works bonds and $39,000 other improvement bonds of the City of Santa Cruz, re-

funded by the bonds now in question, *did not contain any limitation upon the amount of bonds that might be issued or indebtedness incurred for water works or other municipal purposes, under the provisions of said act.* Therefore, any argument made by the learned counsel for the city, that the original bonds refunded by the bonds now in question were invalid, as being beyond any limit prescribed by the statute under which they were issued, is wholly without foundation, as the said act of March 15, 1887, contained no limit whatever.

It may be that the learned counsel for the City of Santa Cruz mean to argue that the original bonds, which were refunded by the refunding bonds now in question, were invalid because issued in excess of some limit prescribed by the said act of March 19, 1889, or the said act of March 11, 1891. If so, then obviously their argument is not that the refunding bonds now in question are invalid as constituting an over-issue beyond a limit prescribed by the statute, for, as we have seen, there is no limit prescribed by statute to the issuance of refunding bonds, but their argument amounts, we repeat, to the proposition that these refunding bonds are invalid because the original bonds which they were issued to refund were invalid.

If this be their proposition, then there are obviously several conclusive answers to any such argument. The first answer is, as we have stated above, that the act of March 15, 1887, under which such original bonds were issued, contained no limit as to amount of bonds which might be issued or indebtedness incurred thereunder. The second answer is, that the recitals in the bonds are conclusive that these present refunding bonds were issued to refund "bonded indebtedness" of the City of Santa Cruz (see on this point the

numerous decisions of the Supreme Court of the United States quoted on this brief under Point I., pp. 40–49).

The holder of negotiable refunding bonds is not bound to see to the validity of the original bonds which are refunded thereby.

This has been expressly decided by the Supreme Court of California in *Meyer vs. Brown*, 65 Cal., 583 [1884], quoted at length on this brief, p. 180. This has also been expressly decided by this Court in the case of *Graves vs. Saline County*, 161 U. S., 359. In that case some of the bonds which were refunded were void and uncollectible, even in the hands of *bona fide* holders, this Court expressly stating (p. 373):

"If the present case stood only on the footing of the original conditional contract of subscription we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that the original bonds were uncollectible even by innocent holders."

Those void bonds, however, were refunded by authority of a vote of the people of Saline County, and the Supreme Court of the United States expressly held that such refunding bonds were valid bonds in the hands of *bona fide* holders (see this case of *Graves vs. Saline County*, stated at length on this brief, p. 58).

See, also, the case of *County of Jasper vs. Ballou*, 103 U. S., 745, where this Court says (p. 752):

"Whether these bonds [that is, the old ones] were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as 'binding and subsisting legal obligations,' and issue in lieu of them other bonds having twenty years

to run and bearing seven per cent. interest instead of ten, and they by their vote said they would. * * * As was very properly said below by the learned circuit judge, 'there must be an end of these contests and defenses some time or other.' There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law" for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended."

See, also (quoted on this brief, p. 68), the case of *State of California vs. Wells, Fargo & Company*, 15 California, 336 (1860), in which the Supreme Court of California held that refunding bonds issued by the State were negotiable instruments, and that it was immaterial that the warrants which they had been issued to refund were stolen from the treasury of the State after they had been already paid and canceled.

Furthermore, the defendant The City of Santa Cruz did not prove that any of the original bonds refunded by the present issue of bonds were invalid either because said original bonds exceeded in amount any limit prescribed by the statutes of California or for any other reason.

There is not only no finding of fact by the Circuit Court to support any such defense of over-issue of such original bonds, but not even any evidence which would support any such finding, if this Court were at liberty to examine the evidence on this point, as it is not, because the findings are conclusive, and this Court cannot look into the evidence.

In other words, the defendant The City of Santa Cruz did not prove any facts to support any such defense, even as against any person, whether he was a *bona fide* holder or not.

The finding of the court is (Record, p. 19, Finding No. 5):

"That on March 13, 1894, the defendant had an outstanding bonded indebtedness of $271,000, or thereabouts, and on said day the assessed valuation of all the taxable real estate and the personal property in said city was $3,907,404; that on said date there was submitted to the qualified electors of the defendant corporation," &c. (here stating the submission of the question of issuing the refunding bonds).

Fifteen per centum of $3,907,404 would be $586,110.60. Of course, assuming that they were all issued for municipal improvements, and were, therefore, all within the provision of Section 5 of the act of March 19, 1889, as amended by the act of March 11, 1891, above quoted, they were way within the fifteen per cent. limit prescribed by the said section.

If, however, the counsel for the defendant the City of Santa Cruz claim that these old bonds ought to be, but were not, within the five per centum limit prescribed by the act of 1889, still it is true that no facts were proved to support any such defense, even as against any person, whether he was a *bona fide* holder or not.

Obviously the question whether these original bonds were valid or not, as being within the limit prescribed by the statutes, would have to be ascertained, not as of the time when they were refunded, but *as of the time when they were issued.* In other words, in order to ascertain whether the said original bonds, if issued for municipal improvements, were within the fifteen per

cent. limit, or within the five per cent. limit, or within any other limit, it would be necessary to ascertain the amount of the indebtedness of the city and the amount of the assessed valuation of the city, not as of the date when such bonds were to be refunded, but as of the date when the said original bonds were issued, or when the indebtedness was incurred which was represented by the said original bonds. *The findings of fact made by the Circuit Court in the present case do not include any findings upon any such facts as of the date when the said original bonds were issued.* The Court does not find what was the indebtedness on the date of the issue of such original bonds, nor does it find what was the assessed valuation of the taxable real estate and personal property in the said city on such date. Not only were there no such findings of fact, but no evidence was presented as to what were such facts, even if this Court were at liberty to look into the evidence, as it is not.

The original bonds, therefore, were valid so far as respects any limitation of amount prescribed by the said acts of March 19, 1889, and March 11, 1891, or as respects any limitation prescribed by any other statute. No defense was proved to impeach said original bonds in this respect, or in any other, even as against a person who was not a *bona fide* holder of the old bonds, or the refunding bonds, much less as against a person who is a *bona fide* holder of the refunding bonds now in question.

Neither the constitution nor any statutes of the state prescribed any limit as respects the amount of refunding bonds that might be issued.

The learned counsel for the defendant, the City of Santa Cruz, in their brief in the United States Circuit

Court of Appeals, argued that the bonds now in question were invalid, because the total amount of these refunding bonds, $360,000, added to the total amount of the old bonds to be refunded (or added to the total amount of old bonds to be refunded, less the $98,000 bonds of the water company assumed by the City of Santa Cruz and authorized, among others, to be refunded), exceeded fifteen per cent. of the assessed valuation of the taxable real estate and personal property in the City of Santa Cruz. The learned counsel thus attempts to argue that Section 5 of the act of March 19, 1889, as amended by the act of March 11, 1891, places a limit upon the amount of refunding bonds that can be issued. They attempt to add together the original indebtedness incurred for public improvements and the refunding bonds issued to refund the same and say that because the two amounts added together exceed fifteen per cent. of the assessed value of the taxable property in the city, therefore, the refunding bonds are invalid. It is clear that such an argument is entirely without foundation. There is, as above stated, no limit in the constitution as to the amount of bonds of any kind that may be issued by municipalities so long as there is a vote of the people and tax levy had with respect to such bonds, both of which were had in respect of the present refunding bonds.

No such question arises, therefore, in this case, as arose in the case of *Doon Township vs. Cummins*, 142 U. S., 366. That case arose under the constitution of Iowa, which provided (Article XI., Section 3):

"No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable

property within such county or corporation—to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness."

Doon Township issued certain bonds to refund its old indebtedness, and sold such new bonds and delivered them while the old bonds were outstanding, so that at the same time both the old issue of bonds and the new issue of bonds were outstanding, and the two together exceeded the five per cent. limit. This Court held that both issues of bonds constituted an indebtedness against the said Doon Township, and that, because the aggregate amount of both issues exceeded the five per centum limitation, therefore the new bonds were invalid, the reason being that the constitution prohibited the township from becoming "indebted in any manner, or for any purpose"—that is, even for the purpose of refunding an old issue of bonds—beyond the five per cent. limitation. That case was decided expressly on the said debt limitation in the Iowa constitution. If there had been no such debt limitation in the constitution the case would not have been decided as it was.

There is no such limitation in the constitution of California. The refunding act of March 1, 1893, expressly provides for the sale of the refunding bonds and for the application of the proceeds of the sale to the purpose of refunding the indebtedness for which the refunding bonds have been issued, thus contemplating that there may be a time when both the old bonds and the new will both be outstanding. There is no debt limitation in the constitution, nor is there anything contained in the said refunding act which prevents both the old issue of bonds and the issue of

refunding bonds from being outstanding at the same time.

Furthermore, there is no finding of fact that these old bonds of the City of Santa Cruz, or some of them, authorized to be refunded by the present issue of bonds, were not, as a matter of fact, taken up and paid and retired by the City of Santa Cruz before or at the time the refunding bonds were issued. There is, therefore, no proof of any fact to support the claim of the defendant that both issues of bonds were, as a matter of fact, outstanding at the same time. Probably they were not so taken up, because there is a finding (Record, p. 15, Finding No. 24) that Coffin & Stanton did not comply with their agreement to pay for the refunding bonds, but this finding is not necessarily and conclusively inconsistent with the city's having itself taken up and paid the old bonds refunded, or some of them. Such a defense to these refunding bonds cannot be sustained without a finding of facts to support it. As the findings now stand, there is no finding that both the old bonds refunded and the refunding bonds themselves were all out at the same time. We mention this want of a finding of facts to support the defense, not because with think such defense would be good even if such finding of facts existed, for there is no limitation upon the amount of refunding bonds which may be issued, and no provision that refunding bonds may not be sold and delivered in advance of the bonds refunded thereby, but in order to call the attention of this Court to the fact that this defense has no finding of fact to rest upon, even if such finding of fact would be sufficient.

NO NOTICE OF OVER-ISSUE FROM CIRCULAR OF COFFIN AND STANTON.—The learned counsel for the City of Santa Cruz, in their brief in the Circuit Court of Appeals, attempted to show that some circular issued by Coffin & Stanton, to wit :—the circular printed in the evidence on page 97 of the record, gave notice to the purchasers of these refunding bonds that there was an over-issue of bonds. The first answer to this is that the findings of fact made by the court do not find or make reference to any such circular, and there was no finding that any purchaser of the bonds had notice of any such circular, or of the facts therein contained. But even if any purchaser of the bonds had seen such circular, it would not have given him notice of any over-issue of bonds, even if there had been any over-issue, and there was not. Said circular does not make any statement as to what was the assessed valuation of the City of Santa Cruz at the time of the issue of the old bonds, nor does it make any statement as to the dates of the issue of the said old bonds, and there is no data furnished in the said circular which would enable any one to arrive at any conclusion as to whether any debt limitation had been exceeded, even supposing any debt limitation had existed, which we deny.

THE CITY OF SANTA CRUZ WAS AUTHORIZED TO ISSUE THESE BONDS BY THE REFUNDING ACT. THAT ACT IS APPLICABLE TO SANTA CRUZ AND IS VALID.—The learned counsel for the defendant, the City of Santa Cruz, also attempted to argue in their brief in the United States Circuit Court of Appeals, that Sections 10 and 12 of the

charter of the City of Santa Cruz (Session Laws of California, 1875–6, pp. 193, 194) provided a limitation upon the indebtedness of the city. Said Sections 10 and 12 are as follows, to wit:

"SEC. 10. The Common Council shall not create, audit or allow, or permit to accrue, any debt or liability above the actual revenue or available means in the treasury, that may be legally apportioned and appropriated for such purpose; nor shall any warrant be drawn, or evidences of indebtedness be issued, unless there shall be sufficient money in the treasury legally applicable to meet the same, except as hereinafter provided."

"SEC. 12. At each regular meeting of the Common Council they shall inquire into the condition of the streets, sewers, bridges, and fire department, and all other property of the city, and whenever the owners of a major part of the taxable property of the city, according to its valuation upon the last preceding assessment roll, shall make written application to the Mayor and Common Council for an expenditure of not exceeding ten thousand dollars for any purpose authorized by this Act, in excess of the revenue of the city for such purpose, in the then fiscal year, the Mayor and Common Council shall have the power, after having caused such application to be spread upon their minutes, to incur such expenditure, although in excess of the revenue of the city for the then current fiscal year, and shall provide for the payment of the same, as directed in said application, by the levy of a special tax for the same or the succeeding fiscal year; *provided*, that the special tax thus to be levied shall, for no one year, be more than one-half of one per cent. upon the valuation of the real and personal property, as shown by the last assessment roll. All special taxes ordered to be levied and collected shall be so levied and collected in the manner, form and ways prescribed for the levying and collecting of the general taxes of said city."

The learned counsel then argue:

"We submit that the charter of the City of Santa Cruz, as enacted in 1876, could not, in the matter of refunding the bonded indebtedness of that city, be

amended by the State Legislature by a general law, unless the City of Santa Cruz should elect to abandon its original charter, and to organize under the general law of the State relating to cities. The new constitution provides for the organization of cities and towns under general laws at the election of the citizens thereof (Const., Art. 11, Sec. 6), and provides that cities organized before the adoption of the Constitution may, *by election*, organize under such general law. The complaint does not show that the City of Santa Cruz ever did elect to organize under any general law," &c., &c.

The learned counsel do not quote the whole of Article XI., Section 6, in support of their proposition of law. If they had, they would have set the matter clear, and would have shown that their proposition is utterly untenable, for that section expressly provides that all cities "shall be subject to and controlled by general laws." The Constitution of the State of California, adopted in 1879, expressly provided (Article XI., Section 6):

"Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws."

Note the language—"*cities* or towns *heretofore* or hereafter *organized*, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." In 1894

when the bonds now in question were issued, it was well-settled law in California that under this provision of the state constitution all cities and towns (those organized before 1879, when the constitution was adopted, as well as those organized afterwards) were "subject to and controlled by general laws."

In *Staude vs. Election Commissioners*, 61 Cal., 313 (1882), the Supreme Court of California decided the precise question. The Court held that notwithstanding the charter of the city and county of San Francisco, known as the consolidation act, which was enacted before the adoption of the constitution of 1879, containing the said Article XI., Section 6, above quoted, the legislature of California had the power to pass general laws, and that the city of San Francisco was, under said Article XI., Section 6, of the constitution, subject to and controlled by such general laws. The Court says)p. 319) :

"The question in this case is whether, by virtue of the Act of the Legislature approved March 7, 1881, and commonly known as the 'Hartson Act', an election of the elective officers of the City and County of San Francisco is required to be held at the general election to occur in November of the present year.

That the Legislature intended the provisions of the Act to apply to San Francisco is not denied. Indeed, it could not be successfully denied, for it provides in terms for the election of all elective county, *city and county*, and township officers, with certain enumerated exceptions; and we know, judicially, that San Francisco is the only 'city and county' within the State. The position of the respondents, however, is that the Consolidation Act of that city and county, which provides that the elections therein shall be held in the odd-numbered years, is unaffected by the provisions of the Act in question. And this, it is said, because of the provisions of the Constitution.

By Section 6 of Article XI. of that instrument it is provided that 'corporations for municipal purposes shall

not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed.' This provision is clearly prospective. But the framers of the Constitution, recognizing the fact that there were municipal corporations already in existence, provided in the same section as follows: 'Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith.' And by the succeeding section the provisions of the Constitution applicable to cities, and, also those applicable to counties, so far as not inconsistent or not prohibited to cities, are made applicable to consolidated city and county governments. If, therefore, the legislature has, by a general law, provided for the incorporation, organization and classification, in proportion to population, of cities and towns, or, if not, whenever it shall do so, the city and county of San Francisco may become organized under such general law whenever a majority of its electors voting at a general election shall so determine, and shall organize in conformity therewith. And until a majority of such electors do so determine, the Consolidation Act of the city and county can not be vacated or abrogated by any general act of incorporation. (*Desmond vs. Dunn*, 55 Cal., 242.) But whether the city and county of San Francisco elects to organize under such general laws or to continue its existence under the Consolidation Act, it is subject to and controlled by general laws; for in the same section of the Constitution, in which the then existing city and town organizations are recognized, and the continuance of their existing charters permitted, it is declared that '*cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws.*'

See, also, to the same effect:

Thomason vs. Ashworth, 73 Cal., 73.
People vs. Henshaw, 76 Cal., 436.
Davies vs. City of Los Angeles, 86 Cal., 37.

City of Los Angeles vs. Teed, 112 Cal., 319.
Los Angeles vs. Hance, 122 Cal., 77.
Morton vs. Broderick, 118 Cal., 474.
Popper vs. Broderick, 123 Cal., 456.
Fragley vs. Phelan, 126 Cal., 383.
Byrne vs. Drain, 127 Cal., 663.

In City of Los Angeles vs. Teed, 112 Cal., 319, the Supreme Court of California expressly held that the refunding bond act of California, contained in the Political Code, which, by its terms, applied to all cities, was valid, and did apply to all cities, no matter how or when organized. Los Angeles was under a special charter. The court also held that the said refunding act of March 1, 1893, which applied to all cities except those of the first class, was valid, and applied to all cities except those of the first class, no matter how or when organized. The court says (p. 325):

"The effect of these sections [of the Political Code] has not been discussed by counsel, it being apparently assumed on both sides that under the decision in *Ex parte Simpson*, 47 Cal., 127, these sections are not applicable to cities organized before the adoption of the codes. But we think that the rule laid down in that case does not apply to these sections, and that they are applicable to all cities. It is true that they are a part of title III. of part IV. of the Political Code, and that it was held in that case that none of the sections of that title were applicable to any existing city. But the sections now in question were added to the code long after that decision, and it is manifest, from their terms, that they were intended to apply to all cities, without exception. The officers therein mentioned are given designations not corresponding to those used in the 'system or plan under which cities may,' under the preceding sections, 'be organized and governed.' They are designated by general terms, studiously chosen so as to include cities of diverse forms of government,

and organized in a manner different from that provided for in the preceding sections of the title. The language so used unmistakably negatives any intention to confine the operation of those sections to cities organized under the code."

This decision by the Supreme Court of California in the case of *City of Los Angeles vs. Teed*, therefore, completely negatives the proposition stated by the learned counsel for the city of Santa Cruz—namely, the fact that the city of Santa Cruz was organized under a special charter in 1876 rendered it impossible under the constitution of California for the legislature of California to pass any general law respecting the issue of refunding bonds which would apply to the city of Santa Cruz, and authorize the issue of such bonds by that city, notwithstanding any earlier provision in the charter of that city to the contrary. The direct converse of this proposition has been expressly decided in *City of Los Angeles vs. Teed, supra.*

In the case of *Los Angeles vs. Hance*, 122 Cal., 77, the Supreme Court had before it the general act of March 19, 1889, authorizing the issue of improvement bonds, and the court granted a mandamus compelling the city clerk to countersign the said bonds, thus holding the said general act valid and applying to the city of Los Angeles, which city is under a special charter. Millions of improvement bonds have been issued in the state of California by charter cities, under the general improvement bond act of March 19, 1889. Many of these bond issues have been before the Supreme Court of California, and the validity of the said act, as applying to charter cities, has always been upheld.

In November, 1896 (which was *after* the bonds in question were issued), the said Article XI., Section 6, of the constitution, was amended by the insertion of the words "except in municipal affairs," so that the last clause in the said Section 6, since that time, reads as follows:

"Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, *except in municipal affairs*, shall be subject to and controlled by general laws."

This provision has been before the Supreme Court of California in the recent cases above cited of *Morton vs. Broderick*, 118 Cal., 474; *Popper vs. Broderick*, 123 Cal., 456; *Fragley vs. Phelan*, 126 Cal., 383, and *Byrne vs. Drain*, 127 Cal., 663. In all of these cases it is both stated and assumed by the court that, except for the insertion of these new words in 1896 in said Article XI., Section 6, of the constitution—to wit, "except in municipal affairs"—the general laws in question in those cases would concededly and admittedly apply to all cities and towns, according to their terms.

Furthermore, in the case of *Fragley vs. Phelan, supra*, arising under said amendment of 1896, HARRISON, J., in his concurring opinion, stated (p. 395):

"The legislature is vested with the law-making power of the state, and the general laws passed by it have force in all parts of the state, unless, by virtue of some provision in the constitution, such effect is limited, or the law-making power has been lodged elsewhere. A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself or was given to it by the legislature. If, in framing its charter, its board of freeholders

should make no provision for a public library, or for the improvement of its streets, the general laws upon those subjects would be operative within that city. It is not within the constitutional power of the legislature, by approving a freeholder's charter, which fails to make provision upon subjects pertaining to municipal affairs, to exempt that city from being subject to legislative control in reference to those subjects, nor can the city secure exemption from such control by omitting to make such provision in its charter."

Therefore, even since 1896, cities in the State of California under special charters adopted as prescribed in the constitution can be the subject of general legislation as respects all matters not provided for by such charters. Before 1896, of course, and in 1894, when these bonds were issued, the provisions of the general laws controlled and modified any contrary provisions in the charter of any city (see the cases cited *supra*, p. 233 *et seq.*). The charter of the City of Santa Cruz contained no provision for the issuance of refunding bonds, and even if it had contained such provisions the general refunding bond act of March 1, 1893, would have controlled any such provisions.

There is, therefore, no foundation for the argument of the learned counsel for the City of Santa Cruz that the said refunding bond act of March 1, 1893, did not apply to the City of Santa Cruz.

N.

The election notice was properly published and posted in the present case.

The learned counsel for the City of Santa Cruz, in their brief in the United States Circuit Court of Appeals, undertook to make the argument that, because the election notice was published by the whole ordi-

nance, No. 315, being published (Finding of Fact No. 7, Record, p. 20, and Additional Finding No. 2, Record, pp. 33, 34), instead of the election notice, which was contained in the said ordinance, being published separately, that, therefore, there was no publication of notice as required by law.

This argument is obviously erroneous. The said Ordinance No. 315 set forth the notice of special election in full, and such notice was published in full as a part of said ordinance. See Finding of Fact No. 7, Record, p. 20, and the notice, which is set forth at length in Additional Finding of Fact No. 2, Record, p. 34. The act of March 1, 1893, authorizing these bonds provides (Section 1):

"Said election shall be called and held in the same manner in which other elections are held in such city or town."

The charter of the City of Santa Cruz provides (Session Laws of 1875–6, p. 189), in Section 5 thereof:

"It shall be the duty of the Mayor and Common Council to call all city elections, to designate the time and place of holding the same, giving at least ten days' notice thereof."

Section 1194 of the *Political Code* of California, as amended in 1893, provides for giving notice of elections as follows (Session Laws of California, 1893, pp. 165, 168):

"1194. At least *ten days* before an election to fill any public office, the County Clerk of each County shall cause to be published, in at least two newspapers of general circulation within the county, the nominations to office certified to him by the Secretary of State, and also all those filed with the County Clerk. He shall make not less than two such publications in each of such newspapers before election day, one of

such publications being made upon the last day upon which such newspaper is issued before the day of election. The list of nominations published by the County Clerks of the respective counties shall be arranged in the order and form in which they will be printed upon the ballot. The Clerk or the Secretary of the legislative body of any incorporated *city* or town with whom the names of any candidates have been filed, shall publish in the same manner the lists of nominations filed with him; but where only one newspaper is printed in any county, city, or town, then publication in such newspaper shall be deemed sufficient; and where no newspaper is printed in such county, city, or town, publication shall be made through any newspaper designated by the Board of Supervisors of said county, or the legislative body of such city or town, and by posting copies of the ballot in three of the most public places in such county, city, or town, not less than ten days before the day of election."

The ordinance, No. 315, ordering the giving of notice of the election (Record, p. 34), provides:

"The city clerk is hereby directed and ordered to cause to be published in the 'Santa Cruz Surf' and 'Santa Cruz Daily Sentinel,' newspapers published and printed in said City of Santa Cruz, in the County of Santa Cruz, for not less than ten (10) days before the thirteenth day of March, 1894, a notice of said special election, and to cause to be posted at each place of election hereinafter mentioned, in said city, a notice of said special election," &c.

The court found (Finding of Fact No. 7, Record, p. 20) that notice of election was posted and published for the length of time prescribed in the said ordinance. This giving of notice was obviously sufficient. The fact that the whole ordinance was published, including the notice, instead of having a separate notice prepared and published separately, does not at all invalidate the notice. This very question was before the Supreme Court of California in the case of *Los Angeles*

vs. Teed, 112 Cal., 319, *in which case, also, the whole ordinance was published.* The court says (p. 325):

"Assuming an election by the voters to be necessary, the defendant contends that the ten days' notice of the election was not given as required by law. We do not think this objection well taken. The ordinance was, in terms, a notice of the election, containing everything necessary for such notice."

But even if there had been any irregularity in publishing the entire ordinance containing the notice of election, instead of publishing a separate notice of election, then such irregularity was ratified and cured by Ordinance No. 320, afterwards passed by the mayor and common council.

Neither the constitution of California nor the refunding act of March 1, 1893, nor any provision of the charter of the city of Santa Cruz, nor any general statute, made any provision as to the particular form in which the notice of election should be published and posted. Obviously, therefore, a notice in the form of an ordinance published in full, such as was Ordinance No. 315 (Finding of Fact No. 7, Record, p. 20; Additional Finding of Fact No. 2, Record, p. 32), satisfied the constitution and the statutes and the charter of the city. If any requirement was not satisfied by the publication and posting of the ordinance in full, instead of publication and posting of a separate notice of election, it was at most only the requirement of said Ordinance No. 315, passed by the mayor and common council of the City of Santa Cruz. But, obviously, any failure on the part of the city clerk or other city officer to comply with such requirement, made only by the mayor and common council, could be waived, and the

action of the city clerk or other city officer ratified and cured by subsequent action of the mayor and city council. This is familiar law, on the principle that subsequent ratification is equivalent to original authority. Such subsequent waiver and ratification of what was actually done sufficiently appears in Ordinance No. 320, passed by the mayor and common council of the City of Santa Cruz. The said Ordinance No. 320 (Finding of Fact No. 8, Record, pp. 20, 21) provided for the issue of the bonds, reciting, among other things, that such bonds are issued

"in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election, duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law."

Therefore, on this record, the only body which, under any construction of the law, had required that a separate notice of election be posted and published, and not merely the ordinance calling the election, has expressly ratified and cured any failure to give such separate notice.

So far as the constitution or statutes of the state or charter of the city required a notice of election, this requirement was satisfied by the publication of the ordinance in full. On this express point see *Los Angeles vs. Teed*, 112 Cal., 319, 325, quoted *supra*.

Furthermore, even if notice of the election had not been properly given, the recitals in the bonds that the election was "duly and legally called and held," and that notice thereof was "duly and legally given and

published in the manner as required by law," are conclusive in favor of the bona fide holder of these bonds, and the city is estopped from making any such defense as that notice was not properly given.

The bonds in question in the present case make the following recital (Record, p. 5)—namely, that they are issued

" in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election *duly and legally called* and held and conducted in said city *as provided under said act*, on Tuesday, the thirteenth day of March, 1894, *notice thereof having been duly and legally given and published in the manner as required by law*, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law."

The cases are numerous in this Court to the effect that a recital like the foregoing in a municipal bond is conclusive in favor of the *bona fide* holder thereof that the election was properly held, and that notice was properly given, and the municipality is estopped to raise any such defense as against the *bona fide* holder.

See the leading case of *Knox County vs. Aspinwall*, 21 How., 539, in which case the attempted defense was the omission to comply with the requirement of the statute in respect of the notices for the election on the question of the issuance of the bonds. This Court held

that the county was estopped from raising any such defense.

See, also, *Humboldt Township vs. Long*, 92 U. S., 642, in which case the act of the Legislature required thirty days' notice, but the election was held within less than thirty days after the date the order provided for holding it, and this Court held the bonds valid in the hands of a *bona fide* holder.

See, also, *Anderson County Commissioners vs. Beal*, 113 U. S., 227, where the defendant offered to prove that notice of election required by law had not been given; and this Court held such evidence not admissible as against a *bona fide* holder of bonds.

See, on the general subject, 1 Dillon on Municipal Corporations, 4th Edition, Sections 520 to 536, and cases there cited.

O.

The requisite majority vote of the electors was had in respect of the present issue of bonds. The objections made by the counsel for the City of Santa Cruz in this respect are wholly without foundation in fact.

The Constitution of the State of California (Article XI., Section 18) provides that indebtedness, beyond the revenue for the year, shall not be incurred by any county, city, town, township, board of education or school district

"without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

Under this provision of the Constitution the assent of two-thirds of the qualified electors of the city of

Santa Cruz who voted at the election was sufficient to authorize the issue of the bonds.

The Court found as a fact (Finding of Fact No. 6, Record, p. 19) that

"more than two-thirds of the qualified electors of the said defendant voted in favor of refunding the then outstanding bonded indebtedness," &c.

The Court also found (Additional Finding of Fact No. 2, Record, pp. 32, 33) that

"more than two-thirds of the qualified electors of the said defendant voting at said special election, voted in favor of refunding the then outstanding bonded indebtedness * * * but less than one-half of the qualified electors of said defendant voted at said election."

These findings of fact show conclusively that the above-quoted provision of the constitution of California was strictly complied with as to the two-thirds vote. The constitution does not require a two-thirds vote of *all* the electors in the municipality. It only requires "the assent of two-thirds of the qualified electors thereof, *voting* at an election to be held for that purpose."

Had the constitution read merely "without the assent of two-thirds of the qualified electors thereof" (and not added the words "voting at an election to be held for that purpose," so that it now reads "the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose"), it would still be true, as held in numerous decisions of this court, that two-thirds of the qualified electors of the city of Santa Cruz who voted at the election were sufficient to authorize the issue of the bonds within the meaning of that provision of the constitution.

St. Joseph Township vs. Rogers, 16 Wall., 644.

County of Cass vs. Johnston, 95 U. S., 360.
Carroll County vs. Smith, 111 U. S., 556.
Knox County vs. Ninth National Bank, 147 U. S., 91.
1 *Dillon on Municipal Corporations*, 4th Edition, Section 277, and cases there cited.

The constitution of California, however, *ex industria*, adds the words "voting at an election to be held for that purpose," so that the clause reads "without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." These words make it perfectly plain that two-thirds of the qualified electors who vote at the election are sufficient; they are put in for this very purpose. There are some decisions in some of the state courts, under constitutions which do not have the words "voting at an election," etc., that the vote of two-thirds, or a majority, of *all* the *persons in a municipality qualified to vote*, whether all vote or not, must be had in order to comply with such provision of a constitution. But in cases where, as in the constitution of California, the words "voting at an election" are added, there is no decision of any court anywhere that two-thirds, or a majority, of *all* the *persons qualified to vote*, is required. Any such decision would obviously be contrary to the very language of the constitutional provision, which requires only two-thirds, or a majority of the voters, "*voting* at an election."

The refunding act of March 1, 1893, authorizing the issue of these bonds, does not expressly state how large a vote shall be required. Of course this statute could not require a smaller vote than is required by the constitution. Inasmuch as the provisions of the constitution have settled how large a vote is required,

a provision on this subject may well have been omitted from this statute.

It is well settled, however, under the general principles of the common law, that, where no express provision is made by a statute, a majority vote of those voting is sufficient (see cases cited *supra*, pp. 246, 247).

In any view, therefore, the provisions both of the constitution of California and of the refunding act as to the requisite majority vote were fully complied with.

But, even if there had been any failure to have the requisite vote of the qualified electors of the city in respect of this issue of bonds, the express recital in the bonds that such vote was had is conclusive in favor of the bona fide holder of these bonds, and estops the city from making any defense that the requisite vote was not had.

The specific recital in the bonds is as follows (Record, p. 5):

This bond is issued "in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law."

On this point it is enough to cite the following cases:

Commissioners of Knox County vs. Aspinwall, 21 How., 539.

Commissioners vs. Bolles, 94 U. S., 104.

Northern Bank vs. Porter Township, 110 U. S., 608.
Oregon vs. Jennings, 119 U. S., 74.
Chaffee County vs. Potter, 142 U. S., 355.
See, also, the cases cited on this Brief, pp. 244–245.

The learned counsel for the city of Santa Cruz, in their brief in the Circuit Court of Appeals, cite the above-quoted provision of Article XI., Section 18, of the Constitution, which, in the case of the issue of bonds of a municipality, requires "the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose," etc., and which adds, "any indebtedness or liability incurred contrary to this provision shall be void." They state in their brief in the Circuit Court of Appeals (p. 230):

"Our contention is that no recitals can estop the city from pleading and proving irregularities and informalities in an election held for the purpose of overcoming a constitutional inhibition against the incurring of an indebtedness without the assent of a certain proportion of the qualified electors. In such case, the holding of a valid election and the assent of a sufficient number of the qualified electors are jurisdictional, and without them the municipality has no authority to proceed further; and any bond issued by the officers of the municipality thereafter is void, *regardless of its recitals, for want of power to issue it.*"

Similar arguments to this have been urged before this Court in numerous other cases, and this Court has always rejected such arguments, and held that a fact required to exist by the constitution of a State, as well as a fact required to exist by a statute, precedent to the issue of negotiable bonds, can be the subject of a valid recital in such negotiable bonds, which recital will estop the municipality.

Thus, in *Oregon vs. Jennings*, 119 U. S., 74, the Constitution of Illinois, which went into effect August 8, 1870 (Section 12, Article 9), prohibited the issuance of bonds beyond an amount equal to five per centum of the taxable property, and then provided further (119 U. S., 91):

"This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution, in pursuance of any law providing therefor."

The facts and one of the questions presented in that case are stated by the court as follows (p. 91):

"It appearing that, when the bonds in question in this suit were issued, the debt of the town was already greater than five per centum on the value of its taxable property, as ascertained by the assessment for 1870, it is contended that the bonds could not be lawfully issued, except in compliance with the vote of June 23d, 1870, and in conformity with the conditions imposed by that vote, one of which was the completion and equipment of the first division of the road on or before January 1st, 1871, and that that condition was not observed. *The question is sought to be made one of power* or authority to issue the bonds, within the rules laid down by this court as applicable even in the case of the bonds in the hands of a *bona fide* holder.

At the time the bonds in question were issued, a statute enacted April 16th, 1869, was in force in Illinois, § 7 of which, Gross' Stat., 1869, vol. 1, 3d ed., p. 556, provided that any town should have the right, 'upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions, or donations shall be made, and such *bonds*, subscriptions, or donations *shall not be valid* and binding until such conditions precedent shall have been complied with.'

The language of this statute was as imperative as is that of the Constitution of 1870 in regard to complying with the conditions contained in any vote of the people; and § 6 of the Act of March 30th, 1869, before

cited, prescribes that the proper corporate authorities of the town shall make the donation or subscription, 'as shall be determined at said election.'

In respect to this compliance with the conditions imposed by the vote of the people, *whether the question is to be regarded as arising under the provision of the Constitution* or that of a statute, *it must equally be regarded as concluded by the recital in the bonds*, made by the supervisor and the town clerk."

Note that the constitution of Illinois contained an absolute prohibition against the town's becoming indebted beyond the five per cent. limit, and made an exception of bonds issued "in compliance with any vote of the people which may have been had prior to the adoption of this Constitution in pursuance of any law providing therefor." The law in question "providing therefor" expressly provided that "such bonds, subscriptions, or donations *shall not be valid and binding until such conditions precedent shall have been complied with.*"

The constitution of Illinois, therefore, and the statute to which it referred, expressly prohibited the issue of the bonds in question, and provided that they *should not be valid* until the conditions precedent should have been complied with. This is the same as the constitution of California which provides that "any indebtedness or liability incurred contrary to this provision shall be void." This Court in the case of *Oregon vs. Jennings* said (p. 92):

"In respect to this compliance with the conditions imposed by the vote of the people, whether the question is to be regarded as arising under the provision of the *constitution* or that of a statute, it must equally be regarded as concluded by the recital in the bonds made by the supervisor and the town clerk."

This Court, in *Oregon vs. Jennings*, added (p. 93):

"The provision of § 12 of Article 9 of the Constitution of Illinois did not introduce any new rule of evidence in regard to the mode of proving, in favor of a *bona fide* holder, the compliance with the vote of the people, but left the compliance to be conclusively established in such a case by the recital in the bonds, made by the designated official authorities".

So, in the case of the constitution of California, the constitution does not undertake to deal with any question of how the facts prescribed as conditions precedent shall be proved, but leaves them to be established in the ordinary way; that is, such facts can be established either by showing their actual existence, or by showing that the municipality has, by its findings and recitals in its ordinances and bonds, estopped itself from proving the contrary. That recitals estop a municipality as to a fact required to exist by a *constitution*, as well as to a fact required to exist by a statute precedent to the issuance of negotiable bonds (see *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255; *Chaffee County vs. Potter*, 142 U. S., 355).

In the case of *Gunnison County Commissioners vs. Rollins*, the court, referring to the recitals in the bonds there in question, said (HARLAN, J., p. 263):

"Do such recitals estop the county from asserting against a *bona fide* holder for value that the bonds so issued created an indebtedness in excess of the limit prescribed by the constitution of Colorado? An answer to this question can be found in former decisions of this court. It is necessary to advert to those decisions, particularly those in which the court considered *the effect of recitals importing compliance with constitutional provisions.*"

The court, after stating decisions in previous cases, and particularly that in *Chaffee County vs. Potter*, 142

U. S., 355, which held valid a recital as respects a fact required to exist by the constitution of the state of Colorado, again decided that such a recital of a fact estopped a municipality from showing that the fact recited was untrue.

P.

E. G. & E. Wallace, the assignors of the plaintiff Waite as to certain of the bonds in suit, purchased and paid for said bonds full value in good faith, and had no notice, actual or constructive, that any of the bonds in question were issued to refund $89,000 water company's bonds assumed by the city of Santa Cruz, or of any other facts showing, or tending to show, any illegality in the refunding bonds. The decision of the Circuit Court on this point was correct.

The opinion of the Circuit Court on this point is found in the Record, page 52 *et seq.* The Circuit Court of Appeals did not hold that E. G. & E. Wallace had even any constructive notice except as all holders of these bonds would have constructive notice of what appears on the records of the City Council—a proposition refuted in Point I. of this Brief.

We confine this point to the discussion of the proposition that E. G. & E. Wallace had no notice, actual or constructive, of any illegality or defect in the one hundred and fifty bonds which they purchased. As we shall show, it is distinctly found by the Circuit Court that they paid full value for the bonds purchased, and that they had no actual notice of any

defect or illegality in their issue, and purchased the same in actual good faith, so that the question of actual notice is eliminated from the case.

But it is claimed by the city, *first*, that E. G. & E. Wallace and all other purchasers were bound to examine or take notice of the ordinances—a proposition which we have already refuted in POINT I. of this brief (p. 40, *et seq*).

It is *next* claimed that they had constructive notice through the agency of F. H. Prince & Company. On this point, as stated above, the Circuit Court (DE HAVEN, J.) decided against the city's contention. Circuit Judge GILBERT agreed with the Circuit Court in its judgment that the plaintiff was entitled to recover. Judge ROSS, who gave the opinion of himself and Judge HAWLEY in the Circuit Court of Appeals, did not express any opinion on this point. We make two answers, which are conclusive, to this contention of the city. The only material point of inquiry here is concerning the knowledge or notice which the said E. G. & E. Wallace had in regard to any defect or illegality in the one hundred and fifty Santa Cruz bonds which they purchased and paid for. As to this (the purchase of these bonds by E. G. & E. Wallace), our propositions are :

(1) That the F. H. Prince & Company were not their agents at all, and, if this be true, of course no knowledge which said F. H. Prince & Company actually had, or constructively had, can be imputed to E. G. & E. Wallace, for the plain reason that F. H. Prince & Company were not, in the purchase of these bonds, the agents of the said E. G & E. Wallace, and no constructive notice can arise from an agency which has no existence in point of fact.

(2) The second answer is that even if there was any agency on the part of F. H. Prince & Company for E. G. & E. Wallace in respect of the purchase of these bonds by E. G. & E. Wallace, then, inasmuch as the said F. H. Prince & Company were also acting as agents for Coffin & Stanton, trying to effect a sale of the bonds for them, for which Coffin & Stanton were to pay F. H. Prince & Company a commission, they, the said F. H. Prince & Company, were acting, or attempting to act, on both sides of the transaction where there was an inherent and unavoidable conflict of interest, and, therefore, any knowledge or notice, actual or constructive, which the said F. H. Prince & Company may have had, as to any alleged or supposed defect in these bonds, cannot be imputed as constructive knowledge to E. G. & E. Wallace. We proceed to make good these propositions.

THE SAID E. G. & E. WALLACE PAID FULL VALUE FOR THESE BONDS. The Finding of Fact is (Record, p. 24, Finding No. 12) : That they gave for 150 of the Santa Cruz refunding bonds now in controversy " 435 shares of the stock of the Page Belting Company and $116,400 in cash."

It is not claimed by counsel for the City of Santa Cruz that E. G. & E. Wallace had any *actual* notice that any of the bonds were issued to refund the water company's bonds (even if that fact would make them illegal, which we elsewhere dispute, see this brief, p. 114, *et seq.*). They did not have in their possession, or see, or read any of the ordinances or notice of election, under which the bonds were issued. Nor is it claimed that they otherwise had any *actual* notice or knowledge of any fact that would make the bonds illegal. That they acted in perfect good faith is obvious from the fact that they paid for the bonds $116,400 cash in ad-

dition to the 435 shares of Belting Company stock. It goes without saying that they would not have done this if they had had the least knowledge, or notice, or even suspicion, that there was anything whatever wrong with the bonds.

It is expressly found by the court (Finding of Fact No. 12, Record, p. 24) that

"E. G. & E. Wallace *had no actual knowledge or actual notice of any of said matters, nor actual notice of any fact* tending to impeach the truth of the recitals contained in said bonds."

The said E. G. & E. Wallace had no constructive notice of any facts impeaching the recitals in the bonds through F. H. Prince & Co. or otherwise.

But it is claimed by the counsel for the City of Santa Cruz that E. G. & E. Wallace had *constructive* notice. These bonds, however, are commercial paper, negotiable according to the law merchant; and as we have shown elsewhere in this Brief (p. 92), where it is sought to affect the *bona fide* purchaser for value of negotiable paper with *constructive* notice, the question is not whether there were grounds of suspicion, or even gross negligence on his part, but the question is whether he has *acted in "bad faith."* See the cases to this effect in this court, quoted on this brief (pp. 92-94). There is not in the record a scintilla of anything to charge E. G. & E. Wallace with any "*bad faith.*" As they had no *actual* notice or knowledge, and as they are not chargeable in the least with any "bad faith," there could be no *constructive* notice to them to impeach these negotiable bonds.

The only theory on which the learned counsel for the city of Santa Cruz attempted to show that E. G. & E. Wallace had constructive notice, is as follows:

Coffin & Stanton, of New York, had these refunding bonds for sale, and were offering them for sale through F. H. Prince & Co., a well known firm of bankers and brokers, of Boston, as their (Coffin & Stanton's) agents (Finding of Fact No. 12, Record, p. 24, and Additional Finding of Fact No. 3, Record, p. 39). See, also, testimony of F. H. PRINCE (Record, p. 245) where he testifies:

"I had dealings with the firm of Coffin & Stanton, of New York, in respect to the refunding bonds of the city of Santa Cruz, California. These dealings were as agents for Coffin & Stanton. I sold for Coffin & Stanton 150 bonds to E. G. & E. Wallace. * * * I had been negotiating the sale with Messrs. E. G. & E. Wallace for two or three weeks before the sale was consummated. * * * Coffin & Stanton sent us all the papers relating to the issue of these Santa Cruz refunding bonds and we submitted them to Mr. Dickinson * * *."

When F. H. Prince & Company offered the said bonds to E. G. & E. Wallace, said F. H. Prince & Company submitted to said E. G. & E. Wallace a copy of the opinion of Z. N. Goldsby, city attorney of the city of Santa Cruz in favor of the validity of the bonds (Additional Finding No. 3, Record, p. 39). They also submitted an opinion by Lafayette B. Gleason, the attorney of Coffin & Stanton, addressed to Coffin & Stanton (Additional Finding of Fact No. 3, Record, p. 40). E. G. & E. Wallace (Record, p. 40, Additional Finding No. 3) were not satisfied with these opinions, and asked for the opinion of some attorney practicing law in Boston. "F. H. Prince & Company thereupon suggested that the opinion of M. F. Dickinson, Jr., of

Boston, should be obtained, and F. H. Prince & Company on their own account and for themselves and not acting as the agents of E. G. & E. Wallace employed the said Dickinson to give his opinion in relation to the validity of said bonds, and as the result of such employment and as the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Company the opinion printed below."

Thus the papers regarding these refunding bonds were sent by Coffin & Stanton to F. H. Prince & Co., their agents in the sale of these bonds, and by them submitted to Mr. Dickinson (F. H. Prince & Co.'s attorney) for his opinion. These papers may have included copies of ordinances 314, 315 and 320. (For copies of these ordinances see Record, pp. 26, 33.)

E. G. & E. Wallace never saw these ordinances 314, 315 or 320, and had no actual knowledge or actual notice of them, and the court expressly so finds (Finding of Fact No. 12, Record, p. 24).

The Findings of Fact by the court on this point are as follows (Record, p. 24):

"12. All of the assignors of plaintiff, other than the one referred to in finding No. 3, and E. G. & E. Wallace, who purchased certain of the refunding bonds and coupons sued on under the circumstances hereinafter set forth in this finding, were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, and sued on in this action, and were without notice of any fact tending to impeach the truth of the recitals in said bonds; and in relation to E. G. & E. Wallace, from whom plaintiff derives the legal title to the remaining bonds and coupons sued on, the court finds that on or about September 22, 1894, E. G. & E. Wallace, assignors of plaintiff, purchased from Coffin & Stanton 150 of the said bonds and coupons referred to in the preceding finding, including eight of the bonds and coupons sued on in this action, giving in exchange therefor 435 shares of the stock of the

Page Belting Company, and $116,400 in cash. Said purchase and exchange was made by the firm of F. H. Prince & Co., acting as agents of E. G. & E. Wallace, and *also acting for Coffin & Stanton*, in the same transaction. The firm of F. H. Prince & Co. received from E. G. & E. Wallace for services as their agents in effecting the sale of the stock of the Page Belting Company, the sum of two thousand five hundred dollars, and *said Coffin & Stanton agreed to compensate said F. H. Prince & Co. for their services rendered to them* in the same transaction by a division of all profits which should be realized by said Coffin & Stanton, upon the resale of the said shares of stock of the Page Belting Company. At the time of the said sale of the refunding bonds of the defendant city to E. G. & E. Wallace, the said F. H. Prince & Co. had notice of all matters recited in the ordinances of defendant, numbered 314, 315 and 320, hereinbefore referred to in the preceding findings. *The said F. H. Prince & Co. did not communicate their said knowledge to E. G. & E. Wallace, and the said E. G. & E. Wallace had* NO ACTUAL KNOWLEDGE OR ACTUAL NOTICE OF ANY OF SAID MATTERS, NOR ACTUAL NOTICE OF ANY FACT *tending to impeach the truth of the recitals contained in said bonds—and unless the notice to F. H. Prince & Co. is to be imputed as notice to them, the said E. G. & E. Wallace had no constructive notice of the facts recited in said ordinances, or of any fact tending to impeach the truth of the recitals contained in said bonds.*"

And as a conclusion of law the Circuit Court found (Record, p. 25):

"2. That E. G. & E. Wallace were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, without notice of the facts recited in the ordinances of the defendant, numbered 314, 315, and 320; and without notice of any fact tending to impeach the truth of the recitals contained in said bonds."

The court afterwards made an Additional Finding as follows (Record, p. 39):

"3. The original finding, No. 12, is amended by adding thereto the following: Prior to the purchase of the bonds by E. G. & E. Wallace, Messrs. F. H. Prince &

Co. submitted to them a copy of the following opinion of Z. N. Goldsby, city attorney of the defendant, practicing law in the city of Santa Cruz, California, namely:

'SANTA CRUZ, CAL., April 25, 1894.

I hereby certify that I have carefully examined all the steps taken and proceedings had relative to the issuance of $360,000, in five per cent. refunding bonds, by the city of Santa Cruz, in the State of California, and the bonds issued pursuant thereto, dated April 16, 1894, and find said proceedings regular, and said bonds legally issued and a valid and binding obligation of said city of Santa Cruz.

Z. N. GOLDSBY.'

And, also, submitted a copy of the following opinion of L. B. Gleason, an attorney-at-law practicing in the city of New York, namely:

'MESSRS. COFFIN & STANTON,
72 Broadway, New York city.

GENTLEMEN: I return you herewith certified copies of the proceedings of the officials of the city of Santa Cruz, Cal., with reference to the issuance of the refunding bonds of said city, bearing date April 16, 1894.

I have made a careful examination of these papers, and of the constitution and statutes of the State of California, with reference to the issuance of refunding bonds by the cities of said State. All the provisions of the constitution and the statutes of the State seem to have been most carefully and fully complied with, and from my examination, I am of the opinion that these bonds are issued in pursuance of the laws relating thereto, and are legal and valid obligations of the said city of Santa Cruz.

Yours truly,
LAFAYETTE B. GLEASON.'

The copies of the opinion of Goldsby and of Gleason were furnished to F. H. Prince & Co. by Messrs. Coffin & Stanton. These opinions were not satisfactory to E. G. & E. Wallace, and they asked for the opinion of some attorney practicing law in the city of Boston. F. H. Prince & Co. thereupon suggested that the opinion of M. F. Dickinson, Jr., an attorney practic-

ing in that city, should be obtained. This suggestion was satisfactory to E. G. & E. Wallace, and it was then agreed between F. H. Prince & Co. and E. G. & E. Wallace that the opinion of said Dickinson upon the question of the validity of said bonds should be obtained by F. H. Prince & Co. F. H. Prince & Co. then, on their own account, and for themselves, and not acting as agents of E. G. & E. Wallace, employed said Dickinson to give his opinion in relation to the validity of such bonds, and, as the result of such employment, and as the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Co. the following opinion, which was afterward by F. H. Prince & Co. submitted to E. G. & E. Wallace prior to their purchase of such bonds:

'BOSTON, August 29, 1894.

F. H. PRINCE & Co.,
2 and 8 State Street, Boston, Mass.:

GENTLEMEN—I have examined the papers that you have submitted in regard to the $360,000 five per cent. refunding bonds of the city of Santa Cruz, Cal., dated April 16, 1894. In my opinion, the bonds are legally issued, in conformity to the laws of the State of California and the ordinances of the city of Santa Cruz, and constitute a legal and valid obligation of said city.

Very respectfully yours,
F. M. DICKINSON, JR.'

Said Dickinson had notice of all the matters recited in the ordinances of the defendant city, numbered 314, 315 and 320, but Dickinson did not communicate his knowledge of said ordinances, or of any of the facts recited therein, to the said firm of E. G. & E. Wallace; *and the said Dickinson, in the examination of said ordinances, and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as attorney of F. H. Prince & Co.*" (Record, pp. 39-41.)

It was thus both proved by evidence and found by the court that in the sale of these bonds F. H. Prince & Company acted as the agents of Coffin & Stanton, and

not as the agents of E. G. & E. Wallace, and that M. F. Dickinson, Jr., was the attorney for F. H. Prince & Company, and *not* an attorney for E. G. & E. Wallace. Both the evidence and the findings show conclusively that in respect of these bonds Coffin & Stanton and F. H. Prince & Company as their agents, were ranged on one side of the transaction, namely, the side of the vendor, endeavoring to pursuade E. G. & E. Wallace to purchase these bonds, and on the other side of the transaction were E. G. & E. Wallace as vendees acting for themselves, exercising their own discretion and themselves *personally* conducting and consummating the purchase of the bonds (Record, p. 101, 102). As respects these bonds, therefore, F. H. Prince & Company were not the agents of E. G. & E. Wallace, but were on the opposite side of the transaction, and were dealing at arm's length with the said E. G. & E. Wallace.

There were two distinct transactions, or a double transaction. One transaction was that Coffin & Stanton as vendors and F. H. Prince & Company as their agents, both acting on the one side as vendors, sold these Santa Cruz bonds to E. G. & E. Wallace, acting on the other side as vendees. The other transaction was that E. G. & E. Wallace as vendors and F. H. Prince & Company as their agents, both acting on one side of the transaction as vendors, negotiated the sale of the Page Belting Company's stock to Coffin & Stanton as vendees.

As to the question whether or not they should purchase these bonds, E. G. & E. Wallace personally acted for themselves and personally exercised their own discretion, and did not employ any agents for that purpose, or give any authority to any one to act

for them, or to bind them as to such purpose. This fact clearly appears in the testimony, in the written correspondence (Record, pp. 99, 239 and 249), and also in the findings. So, also, on the other hand, as to whether or not they should purchase the belting company's stock, Coffin & Stanton acted for themselves, and did not commit any discretion to F. H. Prince & Company.

F. H. Prince & Company, therefore, were not agents of E. G. & E. Wallace to investigate in regard to the legality of these bonds or to buy them, and any knowledge or notice which F. H. Prince & Company or their attorney Dickinson had cannot be imputed as constructive notice to E. G. & E. Wallace.

It is not enough that there is *an* agency in order that a principal may be affected with *constructive* notice of a fact which the agent may know, or of which he may have notice. There are agencies and agencies. There must be an agency *under and by virtue of which* it is the agent's duty to learn and to communicate to his principal the fact in question.

In the case of *The Distilled Spirits*, 11 Wallace, 356, this Court (Mr. Justice BRADLEY giving the opinion) says (p. 367):

"The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is *the agent's duty* to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty. *When it is not the agent's duty* to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, *the reason of the rule ceases*, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal

ought not to be bound by his agent's secret and confidential information."

Applying that rule to the present case, it was clearly not the duty of F. H. Prince & Co., who, as agents for Coffin & Stanton, were trying to sell these bonds to E. G. & E. Wallace to investigate the legality of these bonds for E. G. & E. Wallace, or to inform them of any facts which might affect their legality or their value. E. G. & E. Wallace had not employed them for that purpose. On the contrary Coffin & Stanton had employed F. H. Prince & Co. as their agents to sell these bonds, and F. H. Prince & Co. were bound by that contract of agency to endeavor to effect a sale.

It is legally impossible, as will be presently shown, that the same agents should be the agents of the vendors to sell and of the vendees to buy. And in point of fact, F. H. Prince & Co., were not such hybrid and double-headed agents.

The duty and the interest of F. H. Prince & Co. in the matter of the sale of these bonds were with Coffin & Stanton, vendors, and they were not bound by duty or interest to look out for the vendees. Not only so, but E. G. & E. Wallace, as the testimony, correspondence, and findings all show, were engaged in looking out for themselves as vendees, and did not expect F. H. Prince & Co. to look out for them.

There was, therefore, no basis whatever for imputing any knowledge or notice of any fact as to these bonds by F. H. Prince & Co. to E. G. & E. Wallace. There was no agency or duty or confidence under which such notice could be imputed.

From the very nature of agency, F. H. Prince & Co. could not be as to the sale of these bonds agents

for Coffin & Stanton and also for E. G. & E. Wallace, any more than a person can go in opposite directions at the same time. An agency requires that the agent "*act with a sole regard to the interests of his principal*," and a person can not act as agent with sole regard to the interests of both vendor and vendee. "No man can serve two masters whose interests are in conflict."

In *Story on Agency*, 8th Edition, Section 210, the learned author says:

"In this connection, also, it seems proper to state another rule, in regard to the duties of agents, which is of general application, and that is, that in matters touching the agency, agents cannot act, so as to bind their principals, where they have an adverse interest in themselves [citing cases]. This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with *a sole regard to the interests of his principal*, as far as he lawfully may; and, even if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for; and, in many cases, it is the very last thing which would advance his interests. The seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may. * * * * * * * * * * *; it may be correctly said, with reference to Christian morals, that no man can faithfully serve two masters, whose interests are in conflict. If, then, the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps, in many cases, too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions, that a posi-

tive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity. * * * * * * * * * * * *

§ 211. Hence, it is well settled (to illustrate the general rule), that an agent, employed to sell, cannot himself become the purchaser; and an agent employed to buy, cannot himself be the seller. [And upon the same principle it is held that a contract made by one who acts as the agent of both parties, may be avoided by either principal.] "

As under this rule F. H. Prince & Co. were not agents of E. G. & E. Wallace as to the sale of these bonds, there was no relation of principal and agent between them from which constructive notice as to these bonds could exist.

In *Mechem on Agency*, Section 723, the author says:

" The rule [as to constructive notice] is based, as has been seen, upon the principle that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject matter of the agency, and material to the principal's protection and interests. This presumption, however, will not prevail where it is certainly to be expected that the agent will not perform this duty, as where the agent, though nominally acting as such, is in reality acting in his own *or another's interest*, and adversely to that of his principal. Much less will it be entertained where the agent is openly and avowedly acting for himself and not as agent."

In the present case it is clear, and is so expressly found by the Court, that in the sale of these bonds F. H. Prince & Company were " openly and avowedly " acting as agents for Coffin & Stanton, and not as agents of E. G. & E. Wallace. The rule as to constructive notice, therefore, has no application.

This question was fully considered by the Circuit Court. Mr. Justice De Haven, District Judge, said (p. 53):

"To the general rule that notice to an agent while he is engaged in transacting business for his principal, of matters relating to such business, is notice to the principal, there is an exception which is as well settled as the rule itself. The exception is, that when in the transaction of business entrusted to him by his principal, the agent really acts for his own benefit or for the benefit and advantage of the other party to the transaction, notice to him is not deemed constructive notice to his principal. *Benedict* v. *Arnoux*, 154 N. Y., 715; *Dillaway* v. *Butler*, 135 Mass., 479; *De Kay* v. *Hackensack Water Co.*, 38 N. J. Eq., 158. The facts of this case bring it clearly within the exception stated and applied in the cases just cited."

With this view Circuit Judge GILBERT agreed, for he says in his dissenting opinion in the Circuit Court of Appeals that the judgment of the Circuit Court ought to be affirmed (Record, p. 321); and there is no reason to suppose the other two Judges giving the majority opinion held any different view, for they expressly (Record, p. 315), decided the case upon the single proposition, refuted in Point I. of this Brief, that every purchaser of negotiable municipal bonds has constructive notice of the ordinances of a municipality issuing them.

In *Benedict vs. Arnoux*, 154 N. Y., 715 (1898), the facts were (p. 718) that the late Edwin Booth deposited with the firm of Arnoux, Ritch & Woodford, attorneys at law in the city of New York, the sum of $16,500, to be invested for him on bonds and mortgage. The said Arnoux, Ritch & Woodford invested the said moneys in a mortgage made by the defendant George T. Arnoux to Edwin Booth, the said George T. Arnoux being a brother of William H. Arnoux, the latter of whom was one of the firm of Arnoux, Ritch & Woodford (p. 721). The premises on which the said mortgage was made had belonged to the estate of William Campbell, hav-

ing been devised in trust by him, with power of sale, and a sale had been effected under order of the surrogate's court to said George T. Arnoux, and it was claimed, and it was found by the Appellate Division of the Supreme Court of New York, that the conveyance to said George T. Arnoux was in reality a mortgage (the mortgagor being the Campbell estate and others identified with the Campbell estate), although on its terms it was an absolute conveyance. It was further claimed, on the part of the Campbell estate, that inasmuch as said Arnoux, Ritch & Woodford were the agents of said Edwin Booth to invest the said $16,500, and inasmuch as said Arnoux, Ritch & Woodford had actual knowledge of the fact that the conveyance to George T. Arnoux, which was absolute on its face, was, nevertheless, in reality a mortgage, the said Edwin Booth had, as principal, constructive notice of this fact which came to the knowledge of Arnoux, Ritch & Woodford, his agents. This was one of the defenses set up against the foreclosure of the mortgage.

The Court of Appeals of New York, however, held that even assuming that the said conveyance to said George T. Arnoux was in reality a mortgage, yet said Edwin Booth did not have any constructive notice, although his agents to make the said mortgage had actual knowledge of those facts. On this point the Court of Appeals (HAIGHT, J., giving the opinion) said (p. 728):

"It affirmatively appears in the case that Booth knew nothing of the transaction. It is claimed, however, that the knowledge of his agent is imputable to him. This is true to a limited extent; so long as the agent acts within the scope of his employment in good faith, for the interest of his principal, he is presumed to have disclosed to his principal all the facts that come to his knowledge as agent; *but just as soon as the agent forms the purpose of dealing with his principal's*

property for his own benefit and advantage, *or for the benefit and advantage of other persons who are opposed in interest, he ceases in fact to be an agent acting in good faith for the interest of his principal, and his action thereafter based upon such purpose is deemed to be in fraud of the rights of his principal, and the presumption that he has disclosed all the facts that have come to his knowledge no longer prevails.* The citation of authorities to sustain this proposition is hardly necessary, but it may not be out of place to call attention to the case of *Henry* v. *Allen* (151 N. Y., 1), in which this court has recently said: 'The general rule that notice to the agent, while acting within the scope of his authority and in regard to a matter over which his authority extends, is notice to the principal, rests upon the duty of disclosure by the former to the latter of all the material facts coming to his knowledge with reference to the subject of his agency and upon the presumption that he has discharged that duty. *Casco Nat. Bank* v. *Clark*, 139 N. Y., 307, 313; *Hyatt* v. *Clark*, 118 N. Y., 563; *Case of the Distilled Spirits*, 11 Wall. 356, 367.) This presumption, however, does not always arise, for there are several exceptions well recognized by the authorities. Thus, when the agent has no legal right to disclose a fact to his principal, or he is engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose. (*Innerarity* v. *Merchants' National Bank*, 139 Mass., 332; *S. C.*, 52 Am. Rep. 710; *Weisser* v. *Denison*, 10 N. Y., 68, 76; *Frenkel* v. *Hudson*, 82 Ala. 158; *Western M. & I. Co.* v. *Ganzer*, 63 Fed. Rep., 647; *Hudson* v. *Randolph*, 66 Fed. Rep., 216; *Kettlewell* v. *Watson*, L. R. [21 Ch. Div.] 707; *Cave* v. *Cave*, L. R. [15 Ch. Div.] 639; Mechem on Agency, § 721.)' Mr. Pomeroy says in his work on Equity Jurisprudence: 'When an agent or attorney has in the course of his employment been guilty of an actual fraud, contrived and carried out for his own benefit, by which he intended to defraud, and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney, and thus fraudulently concealed.' (§ 675.)"

Note that in this case the Court of Appeals said (p. 718) that the Special Term (whose judgment the Court of Appeals affirmed, p. 730) had found

" that in the whole of the transactions aforesaid there was *no fraud* or deceit practiced by the said Arnoux, Ritch & Woodford, or any one connected with that firm, on the executors of the last will and testament of the said Campbell; but said executors acted advisedly and with full knowledge and upon their own judgment in making the sale to said George T. Arnoux, and with full knowledge that the said George T. Arnoux borrowed part of the purchase money to pay for the premises from said Booth, and that the mortgage involved in this action was given to secure the amount so borrowed."

There was, therefore, *no actual fraud intended or perpetrated* by the said firm of Arnoux, Ritch & Woodford, and the Court of Appeals does not proceed upon the ground that there was any actual fraud. What the court says is (p. 728), that the action of an agent in such a case " is *deemed* to be in fraud of the rights of his principal." The important thing, and the only important thing, is that the agent by acting for himself or for a third person, as the New York Court of Appeals says, *supra*, " ceases, in fact, to be an agent acting in good faith for the interest of his principal." It matters not that there may be no actual fraudulent intent on the part of the agent. The relation is so inconsistent that the law says the doctrine of *constructive* notice (which depends upon the agent acting *solely in the interest of the principal*) ceases to apply.

A little reflection shows that if this were not the law, then in these days of division of labor and functions, and the multitudes of brokers and bankers, and other agents, and the complexity of interests frequently represented by the same persons or firms, no one would

be safe against a doctrine of imputed or constructive notice through some agency or other, though the person sought to be affected with notice be utterly ignorant of the fact in question, and acting in the utmost good faith, and paying out large sums of money, especially in the case of negotiable securities. If the rule contended for by the learned counsel for the city of Santa Cruz were correct, then no one would dare to buy a negotiable bond of or through a broker without first examining the broker and all his employes, and also examining all the papers that happened to be in the broker's office, or that had passed through the hands of the broker, whether the broker had read them or not, at the peril of being affected with imputed or constructive notice of some facts known to the broker or contained in such papers, if he did not make such examination. Such an absurd and impracticable rule of law does not exist.

In *Dillaway vs. Butler*, 135 Mass., 479, the facts are stated in the head-note as follows:

"A., to whom B. was indebted, advised C. to lend money to B. on the security of a mortgage of personal property, and A. acted as C.'s agent in completing the transaction. With the money thus obtained B. paid A. the debt which he owed him. Both A. and B. acted in fraud of the Gen. Sts. c. 118, §§ 89, 91; but C. had no knowledge of the fraud. Held, that the knowledge of A. was not in law imputable to C."

In this case it will be observed A. attempted to act as a middleman between C. on the one hand and B. on the other. It was urged that the knowledge of A. was, in law, imputable to C., because A. acted as C.'s agent in carrying out the transaction. But the court held that the knowledge was not imputable. The court said (p. 481):

"The agent was not a general agent, nor a solicitor nor attorney of record, but was merely an agent to complete the transaction, which, under his advice, the plaintiff had himself determined upon. There is no presumption that the agent's knowledge was communicated to his principal, and the evidence shows that in fact it was not. See *Wilde* v. *Gibson*, 1 H. L. Cas. 605; *Cave* v. *Cave*, 15 Ch. D. 639."

In *De Kay vs. Hackensack Water Company*, 38 N. J. Eq., 158, the material facts and opinion are stated by the Court as follows (p. 160):

"The right of the fifty-one bonds to participate is denied on the ground that the two banks just named were not *bona fide* holders. It is claimed that when these banks acquired the bonds they were chargeable, in law, with knowledge of the fact which rendered the mortgage invalid. This charge is based on this state of facts: Charles H. Voorhis was the president of the corporation which made the mortgage and issued the bonds; as already stated, he procured the mortgage to be made contrary to law; he was also president of both of the banks, and negotiated the transfer of these bonds from the water company to the banks. Now, if the knowledge which Mr. Voorhis acquired while acting as president of the water company is imputable to to the banks in consequence of his connection with them as president, then it is clear that the banks are chargeable with all that he knew, and that in this controversy they are entitled to no better position, in a legal point of view, than Mr. Voorhis would occupy himself if he were here claiming to recover on these bonds. * * *

"(p. 161). The case against the right of these bonds to participate must stand, if it can stand at all, on the ground that the knowledge which Mr. Voorhis acquired as president of the water company became the knowledge of the banks when he came to act for them as their president in a transaction in which the interest of the banks stood opposed to the interest of the water company. But that is not the position in which the law places two principals represented by the same agent. On the contrary, I understand the law to be that where an agent representing two principals concocts a scheme to defraud one of them for the benefit

of the other, it will be presumed that he did not disclose, to the principal he intended to cheat, the means by which he intended to effect his purpose. This court has decided that where an officer of a corporation deals with the corporation in a matter in which his interest is opposed to the interest of the corporation, he does not, in such transaction, represent the corporation so as to make his knowledge the knowledge of the corporation. *Barnes v. Trenton Gas Light Co., 12 C. E. Gr., 33.* The same principle has been held to apply where two corporations have, in a transaction between them, been, in part at least, represented by the same agent. It appeared in *In re Marseilles Extension Railway Co., L. R. (7 Ch. App.) 161,* that the same person was a director in both the Marseilles Extension Railway Company and the Credit Foncier and Mobilier of England, and that he had borrowed money of the Credit Foncier for the railway company, to 'rig' the market with the stock of the railway company. It was conceded that if the Credit Foncier lent its money to the railway company, knowing that the railway company intended to use the money to "rig" the market with its own stock, the Credit Foncier could not recover. The only attempt made to show such knowledge on the part of the Credit Foncier, was to show that the person who borrowed the money and who constituted part of the managing body of both corporations, knew that the money was to be used for that purpose, but this was held not to be sufficient. Lord Justice JAMES said: 'I cannot understand how a director of a company, going to borrow money from another company, of which he is also a director, can put the company from whom he borrowed it in any different position from that which a joint stock bank would be placed by a director of it asking a loan for himself.' The burden in this case is on the party alleging want of *bona fides*. The mere possession, by an endorsee or assignee, of an instrument possessing negotiable qualities, imports, *prima facie*, that he acquired it *bona fide*, for value, before maturity, and without notice of any fact impeaching its validity. My conclusion is that the banks were *bona fide* holders for value, and consequently that the Hackensack Water Company, re-organized, are entitled to stand in their right."

The learned counsel for the City of Santa Cruz undertook, in the United States Circuit Court of Appeals, to distinguish the case of *De Kay vs. Hackensack Water Company*, on the ground that in that case there was fraud on the part of the agent, or an attempt on his part to defraud, and that in the present case there was no such fraud. It requires but slight consideration to show that there is no such distinction between the two cases. In the case of *De Kay vs. Hackensack Water Company* it was claimed that the Hackensack Water Company bonds were illegal, and that Mr. Voorhis knew that fact. *That was the only "fraud."* So in the present case it is claimed by the learned counsel for the City of Santa Cruz that the Santa Cruz bonds were illegal, and that F. H. Prince & Company, or their attorney M. F. Dickinson, Jr., on seeing the said Ordinances Nos. 314, 315 and 320, knew that they were illegal. If the learned counsel claim anything less than this, obviously the whole foundation for their claim that E. G. & E. Wallace are charged with any notice as to illegality of the bonds is swept away, for certainly if F. H. Prince & Company did not have notice of such illegality from the said Ordinances Nos. 314, 315 and 320, then E. G. & E. Wallace could not, on any theory, have any such notice. The position of the learned counsel for the City of Santa Cruz is this: that F. H. Prince & Company, acting for Coffin & Stanton in trying to sell these bonds, and with notice that these bonds were illegal, effected a sale of the same to E. G. & E. Wallace. It was on precisely these facts, in the case of *De Kay vs. Hackensack Water Company*, that the Court there held that the knowledge of the agent was not constructive knowledge or notice to the vendee.

Of course, the fact that there was *actual* fraud on the part of an agent would not prevent the rule applying that, where an agent assumes to act for himself or for some third person, the doctrine of constructive notice ceases; but actual fraud is not necessary in order that such rule may apply, as the New York case of *Benedict vs. Arnoux*, *supra*, and other authorities abundantly show.

A case directly in point is *Allen v. South Boston Railroad Company*, *Craft v. Same*, 150 Mass., 200 (1889). In the case of Mrs. Craft, the facts were as follows: William Reed was a stock broker in Boston. Mrs. Craft purchased through Reed, as broker, shares of stock of the South Boston Railroad Company. Reed was also treasurer of said South Boston Railroad Company. It turned out afterwards that the president of the railroad company had signed certificates of stock in blank, and left them with Reed, and that Reed had signed a certificate as treasurer and delivered such certificate to Mrs. Craft, under her said purchase, without any old stock having been transferred. This was, therefore, a new issue and an overissue of stock made by the said Reed, who thus committed a fraud upon the South Boston Railroad Company, of which he was the treasurer. Mrs. Craft brought an action against the South Boston Railroad Company, either for damages or to compel the company to cause the shares to be transferred and new certificates issued. The company defended on the ground, among others, that Mrs. Craft, as principal, had constructive notice of what was known to Reed, her broker and agent, and that, therefore, there was to be imputed to her the knowledge of the fact that Reed, in issuing the certificate, was mak-

ing an overissue of stock and cheating the railroad company.

The Supreme Court of Massachusetts held, however, that Mrs. Craft did not have any such constructive notice. On this point the Court (FIELD, J., giving the opinion) said (p. 205):

"In the second case, the plaintiff received from Reed, as broker, a certificate, in her name, of the stock which he said he had bought for her, and there is nothing to show that this was not the usual way in which brokers transacted such business. Apparently Mrs. Craft acted as a purchaser through a broker usually acted, and we see no want of due care on her part.

"Another question arises in her case from the fact that Reed, who committed the fraud upon the defendant, was also her agent in the transaction. If he be regarded as acting in two capacities, and as having committed the fraud in his capacity as treasurer, he yet, as her agent, knew of and participated in it. Is this knowledge to be imputed to her in determining her rights against the defendant?

"The general rule is, that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. *Suit v. Woodhall*, 113 Mass., 391. *National Security Bank v. Cushman*, 121 Mass., 490. *Sartwell v. North*, 144 Mass. 188. *The Distilled Spirits*, 11 Wall. 356. There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is *beyond the scope of his employment*, and therefore knowledge of it,

as matter of law, cannot be imputed to the principal and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a *tort* wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established. *Kennedy v. Green*, 3 Myl. & K. 699. *Espin v. Pemberton*, 3 DeG. & J. 547. *Rolland v. Hart*, L. R. 6 Ch. 678. *In re European Bank*, L. R. 5 Ch. 358. *Cave v. Cave*, 15 Ch. D. 639. *Kettlewell v. Watson*, 21 Ch. D. 685, 707. *Innerarity v. Merchants' National Bank*, 139 Mass. 332. *Dillaway v. Butler*, 135 Mass. 479. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268. *Howe v. Newmarch*, 12 Allen, 49.

This case seems to us to fall within this exception. *Although the fraudulent act of Reed may not have been committed with the intention of cheating the plaintiff, yet that was its legal effect*, and it was a fraudulent act committed by him for his own benefit, the actual effect of which would have been wholly to avoid the transaction if the plaintiff had known of it.

The present cases, we think, fall within the principle, that, where one or two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit the fraud.

The defendant cannot be compelled to issue new certificates, or to recognize the old ones as valid, because to do so would cause an over-issue of its capital stock, but it is liable in damages."

Note that in this case there was no evidence that Reed intended to defraud Mrs. Craft any more than there is evidence in the present case that F. H. Prince & Company, or their attorney, M. F. Dickinson, Jr., intended to defraud E. G. & E. Wallace. In Mrs. Craft's case, the court said (p. 206):

"Although the fraudulent act of Reed may not have been committed with the intention of cheating the plaintiff, yet that was its legal effect, and it was a fraudulent act committed by him for his own benefit, the actual effect of which would have been wholly to avoid the transaction if the plaintiff had known of it."

So, in the present case, on the theory advanced by the learned counsel for the city of Santa Cruz, if F. H. Prince & Company, or M. F. Dickinson, Jr., their attorney, had notified E. G. & E. Wallace of the contents of the ordinances, Nos. 314 and 315, the actual effect of such notification would have been to render these refunding bonds void in their hands. Their not giving such notification to E. G. & E. Wallace was, therefore, in the view presented by the learned counsel for the city of Santa Cruz, a fraud upon E. G. & E. Wallace. They might not have intended to cheat E. G. & E. Wallace, but, in the language of the Supreme Court of Massachusetts, above quoted, "that was its legal effect," if the theory of the counsel for the city of Santa Cruz be correct.

There is a large number of cases in which the courts have held that where the agent has ceased to act, in the language of Story (see *Story on Agency*, quoted *supra*, p. 265), "*with a sole regard to the interests of his principal*," either by acting for some third person or by acting for himself, then, as the agency has, *pro tanto*, ceased, the doctrine of constructive notice does not apply. Any agent who thus acts for and in the interest of a third person, or for and in his own interest, instead of for and in the interest of his principal, is guilty of a fraud upon his principal. Some of the cases have been cases of glaring fraud on the part of the agent, but the extent and nature of the fraud are immaterial. The one essential fact as stated in the opinion of the Court of Appeals of New York, in *Benedict vs. Arnoux*, 154 N. Y., 715, *supra*, is that the agent "ceases in fact to be an agent acting in good faith for the interest of his principal." The important point is that in such a case the relation of confidence

and trust which the principal has reposed in the agent, and which make it the duty of the agent to communicate to the principal the facts which come to his knowledge, has been broken off by the act of the agent in assuming a relation either to the interests of some third person or to his own interests, which makes it impossible for that relation with his principal any longer to exist. In the language of Mr. Justice STORY *(Story on Agency*, quoted *supra*, p. 265*)*: "No man can faithfully serve two masters whose interests are in conflict." It is the breaking off of this relation of confidence and trust with the principal, which in effect breaks off the agency, that makes the doctrine of constructive notice cease to have any application. It is immaterial whether, when this agency is broken off, it is done for the purpose of the agent's committing some glaring fraud upon his principal, although that is, perhaps, the most frequent case. The only material thing is that the agency and the relation of trust and confidence no longer exist.

The principles here stated have been applied in many cases, and they are the principles that run uniformly through this line of cases. These are the principles that explain all of the cases, although the cases vary as to their particular facts. It is necessary, of course, in any case to look at the particular facts, including among others the nature and extent of the particular agency.

This Court, in the recent case of *American Surety Company vs. Pauly* (No. 1), 170 U. S., 133 (1898), considered and decided the question here presented in accordance with the propositions and views stated in this brief. One Collins, president of the California National Bank of San Diego, California, signed a cer-

tificate (p. 135) as to the good character of O'Brien, an employe of the bank, who was, or was to become cashier of the bank. This certificate accompanied the application of said O'Brien to obtain a bond of the American Surety Company for faithful performance of his duties as cashier of said bank. The bond contained provisions requiring the employer to give notice of any act on the part of the employe which might involve a loss, etc. (p. 136). Afterwards said O'Brien assisted the said Collins in making embezzlements from the said bank. The surety company was sued upon the bond, and, among other defenses, it set up that the bond was void by reason of fraudulent misrepresentations and concealments of Collins, acting as the president of the bank (p. 149). It was urged in support of such defense that Collins, being president of the bank, and an agent of the bank, had knowledge of O'Brien's dishonesty, therefore the bank had constructive notice of O'Brien's dishonesty. On this point this Court (Mr. Justice HARLAN giving the opinion) said (p. 156):

"It must therefore be taken, as between the bank and the company, that the former cannot be deemed, merely by reason of Collins' relation to it, to have had constructive notice that he, as president, gave the certificate in question.

The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations *not in execution of any duty that he owes to the principal, nor within any authority possessed by him*, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

In *Henry v. Allen*, 151 N. Y. 1, 10, the court recognized the general rule. But after observing that it

rested upon the agent's duty to disclose such facts to his principal, it held that one of the exceptions was that where the agent was 'engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose.'

To the same effect are *Benedict* v. *Arnoux*, 154 N. Y. 715, and *Kettlewell* v. *Watson*, 21 Ch. Div. 685, 707. In the latter case it was said that the presumption arising from the duty of the agent to communicate what he knows to his principal 'may be repelled by showing that, whilst he was acting as agent *he was also acting in another character*, viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character.'

In *Commercial Bank* v. *Cunningham*, 24 Pick. 270, 276, which involved the question whether certain notes held by a bank were to be deemed to have been made for the accommodation of a firm, one member of which was a director of the bank at the time the notes were taken, it was held that the knowledge of the latter, although a director, was no proof of notice to the corporation, 'especially as he was a party to all these contracts, *whose interests might be opposed to that of the corporation.*' This principle is reaffirmed in *Innerarity* v. *Merchants' National Bank*, 139 Mass. 332, 333, in which the court said: 'While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of *such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy*, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating'—citing *Kennedy* v. *Green*, 3 Myl. & K. 699; *Cave* v. *Cave*, 15 Ch. D. 639; *In re European Bank*, L. R. 5 Ch. App. 358; *In re Marseilles Extension Railway*, L. R. 7 Ch. App. 161; *Atlantic National Bank* v. *Harris*, 118 Mass. 147; *Loring* v. *Brodie*, 134 Mass. 453.

In *Terrell* v. *Branch Bank of Mobile*, 12 Alabama, 502, 507, the question was as to the liability of the maker of a note executed in blank and delivered by him to a director of a bank to be filled up with a certain sum, and to be used in the renewal of a note of the maker already held by the bank. The director (Scott) filled up the note for a larger amount and had it discounted for his own use, he acting as one of the directors when the discount occurred, but concealing the facts from the other directors. It was contended that the knowledge of Scott as director of the circumstances under which the note was made and offered for discount, his connection with the directory, and his presence when it was discounted by the bank, were in law a notice to the other directors of the facts. The Supreme Court of Alabama said: 'It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended —he was contracting with the bank through his associates in the directory—he was borrowing, not lending its money—though a member of the board and present too, it cannot be supposed that he coöperated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan.'

"In his treatise on Equity Jurisprudence, Pomeroy says: 'It is now settled by a series of decisions possessing the highest authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed.' Vol. 2, § 675.

"Further citation of authorities would seem to be unnecessary to support the proposition that if Collins

gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests."

In the case of *Innerarity vs. Merchants' National Bank*, 139 Mass., 332, the plaintiffs had shipped a cargo of sugar to one Burgess, accompanied by a bill of lading, consigned to said Burgess and shipped to Burgess' order. Burgess had possession of the bill of lading, with authority to sell the sugar. Instead of selling it, Burgess pledged the sugar and delivered the bill of lading to the Merchants' National Bank for a loan of $43,000. Burgess was a director of the bank, and was present when the loan was approved. It was admitted that the pledge was good, unless the bank was affected with the knowledge of Burgess, its director. The Court held that the bank was not thus affected with notice. On this point the court said (p. 333):

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. *Kennedy* v. *Green*, 3 Myl. & K. 699. *Cave* v. *Cave*, 15 Ch. D. 639. *In re European Bank*, L. R. 5 Ch. 358. *In re Marseilles Extension Railway*, L. R. 7 Ch. 161. *Atlantic National Bank* v. *Harris*, 118 Mass. 147. *Loring* v. *Brodie*, 134 Mass., 453.

One of the most recent cases on this point is *Dillaway* v. *Butler*, 135 Mass. 479. A., to whom B. was indebted, advised C to lend money to B. on the security of a mortgage of personal property, and acted

as C.'s agent in completing the transaction. With the money thus obtained B. paid A. the debt he owed him. Both A. and B. acted in fraud of the Gen. Sts. *c.* 118, §§ 89, 91; but C. had no knowledge of the fraud. It was held that the knowledge of A. was not in law imputable to C., although A. had acted for C. in the negotiation.

* * * * * *

The proposition, that a director of a corporation acting avowedly for himself, or on behalf of another with whom he is interested in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority. *Stratton* v. *Allen*, 1 C. E. Green, 229. *Barnes* v. *Trenton Gas Light Co.* 12 C. E. Green, 33. *Hightstown Bank* v. *Christopher*, 11 Vroom, 435. *Winchester* v. *Baltimore & Susquehanna Railroad*, 4 Md. 231. *Wickersham* v. *Chicago Zinc Co.* 18 Kansas, 41. *Seneca County Bank* v. *Neass*, 5 Denio, 329, 337. *Third National Bank* v. *Harrison*, 10 Fed. Rep. 243. *Stevenson* v. *Bay City*, 26 Mich. 44. *In re Marseilles Extension Railway, ubi supra. In re European Bank, ubi supra.*"

In *Frenkel vs. Hudson*, 82 Ala., 158 (s. c., 2 Southern Reporter, 758), the Court sufficiently states the facts in the decision as follows (p. 160):

"The appellee Frenkel, as assignee of the Citizens' Mutual Insurance Company, an insolvent corporation, filed the present bill against the appellant Hudson, who is assignee of the Point Clear Improvement Company, also an insolvent corporation, and other defendants, to compel specific performance of an alleged agreement to execute a mortgage to secure the purchase-money of certain real estate conveyed by the complainant insurance company, in February, 1885, to the defendant Adams, and by the latter to the defendant corporation, the Point Clear Improvement Company. A second aspect of the bill, claiming a vendor's lien on the same property, having been abandoned as untenable, need not be noticed in this discussion.

The main issue, in our opinion, upon which the decision of the cause must turn, is, whether the Point Clear Improvement Company, to which Adams conveyed the land, can be regarded as a *bona fide* purchaser for value, without notice of the latent equity sought to

be fastened on the property in the present bill. The chancellor decided that the company, as vendee, was chargeable with such notice, and this finding is before us for review.

* * * * * *

(p. 162) 2. We next inquire whether the vendee of this property, the Point Clear Improvement Company, is chargeable with notice of Adams' defect of title. Did it have notice of the fact that he acquired title under an agreement of Goelet to execute the mortgage described in the bill? The corporation was organized for the purpose of carrying on a hotel business, and other enterprises collateral to this object. It was an artificial person, entirely separate and distinct from the natural persons owning shares of its capital stock. And this capital stock was a trust fund to be preserved for the primary benefit of the corporate creditors,—a principle which has a potential bearing, as here, in the case of insolvent corporations.—*Glenn* v. *Semple*, 80 Ala. 159. It nowhere appears that the board of directors, or corporate managers of the company, had knowledge of any facts sufficient to put them on inquiry as to the existence of this equity. The only mode in which it is sought to bring home notice to the company is through its president, Goelet, who had actual knowledge of the alleged agreement; and it is insisted that the knowledge of the agent must be imputed to the principal. The general rule is, that notice of a fact acquired by an agent, while transacting the business of his principal, operates constructively as notice to the principal. This rule applies, of course, as well to corporations as to natural persons.—*Reid* v. *Bank of Mobile*, 70 Ala. 199. *It is based upon the principle, that it is the duty of the agent to act for his principal upon such notice*, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. *It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal.* His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: *first*, that he will very likely, in such case, act for himself, rather than for his principal; and, *secondly*, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the es-

stablished rule of law on this subject.—*Terrell* v. *Branch Bank of Mobile*, 12 Ala. 502; *Lucas* v. *Bank of Darien*, 2 Stew. 321; *Wickersham* v. *Chicago Zinc Company*, (18 Kan. 481), 26 Amer. Rep. 784; Angell & Ames on Corp., §§ 308, 309; Story on Agency, § 140.

The testimony satisfies us that Goelet bought the land from the Citizens' Mutual Insurance Company for himself, at one price, and sold it at another to the Point Clear Improvement Company, in payment of a debt due for stock subscription. The contention that he bought for the defendant company is not sustained by the record. In making the sale, therefore, through Adams, he was acting for himself, in his own interest, and in an adversary character. It is not to be supposed that he communicated his knowledge of the alleged equity to his vendee, by informing its board of directors, or other managing officers, of the existence of such a prejudicial fact. His own knowledge, as president of the company, was insufficient to charge the company in its corporate capacity with notice.

The decree of the chancellor, being opposed to these views, is reversed; and a decree will be rendered in this court, adjudging the complainant not to be entitled to the relief prayed, and dismissing his bill."

First National Bank vs. Foote, 12 Utah, 157 (s. c., Pacific Reporter, 205), was an action on a promissory note. Hague, the cashier of the bank, was interested, with certain other persons, in having the bank take the note for the money which the bank had advanced. He, with the defendant Foote, and others, had signed the note, and had represented to said Foote and others that one Whitmore would join in signing it, and had represented to them that the note was not to be delivered to the bank until signed by Whitmore. It was claimed that the knowledge of said Hague, cashier of the bank, that the note was not to become effective until signed by said Whitmore, was to be imputed to the bank, and hence, that the bank could not recover on the note. The court, however, held that such

knowledge was not to be imputed to the bank. On this point the court said (p. 168):

"3. The third question is the one most argued and relied on by appellants. Their position is that the agreement between Hague and the appellants was that the note was not to become complete until signed by Whitmore; that the bank took it charged with Hague's knowledge of this agreement; that, even if respondent was not bound by Hague's representations, because of his individual interest in the transaction when the note was received, Hague's knowledge is to be imputed to it; that, even if this be not so, the note having been delivered in violation of the condition that Whitmore should sign, it devolved upon the respondent to show that it was a holder in good faith, for value, without notice of the note's infirmity. The general rule is well established that a principal is bound by the representations of his agent, made in the transaction of the principal's business, within the real or apparent scope of his authority, and that the knowledge of the agent concerning the business which he is transacting for his principal is to be imputed to his principal. There are, however, exceptions to the general rule no less well established. *No person can act as an agent in regard to a contract in which he has any interest*, or *in which he is a party on the opposite side to his principal.* 2 Daniel, Neg. Inst. § 1611; Story, Ag. § 210; *Claflin* v. *Bank*, 25 N. Y. 293; *Voltz* v. *Blackmar*, 64 N. Y. 440; *West St. Louis Sav. Bank* v. *Shawnee Co. Bank*, 95 U. S. 557. In the case at bar, Hague, although cashier of the respondent bank, and empowered to represent it, and speak for it generally in such transactions, was himself a party to the note on the side opposite to respondent. If it should be held that he represented and spoke for the bank in that transaction, as its agent, he would be permitted to occupy exactly that adverse and inconsistent relation which the law forbids. He had no power or authority to act or speak for the respondent in that matter. He stood upon one side, with his co-makers, the appellants, and the bank stood upon the other side. *They dealt with each other, not as principal and agent, but as payor and payee, representing adverse interests, and occupying adverse positions.* In such a case the representations of Hague to his comakers were not binding on the bank, and his knowledge of such representations could not be imputed to the bank without

violating rules of law well settled both upon principle and authority. *Innerarity* v. *Bank*, 139 Mass. 334, 1 N. E. 282; Mechem, Ag. §§ 723, 729; *Frenkel* v. *Hudson* (Ala.) 2 South. 758; *Wickersham* v. *Zinc Co.*, 26 Am. Rep. 786.

In *Kettlewell vs. Watson*, 21 Ch. Div., 685 (cited by Mr. Justice HARLAN, *supra*, p. 281), the facts were (page 687): Richardson & Watson were land and estate agents. They granted certain land to the defendant William Watson (p. 688). He did not employ any solicitor in the matter, but he allowed Richardson & Watson, at their suggestion, to employ their own solicitor to prepare the conveyance for him. He had no actual notice of the plaintiffs' lien (vendor's lien for the purchase money) and he made no inquiries about the title or the deeds, nor did he search the register. Richardson & Watson knew of the vendor's lien. In fact (p. 687), the £1,500 of the purchase money for which the vendor's lien existed was due from Richardson & Watson. It was claimed that Richardson & Watson were the agents of William Watson, and the knowledge of Richardson & Watson was imputed to William Watson. The court held, however, that although they were agents, the mere fact that they were agents was not sufficient to cause notice to be imputed. On this point the court (FRY, J.,) said (p. 707):

"The first Defendant is *William Watson*. He purchased a small lot, which was conveyed to him by a deed of the 16th of January, 1873. He employed *Richardson & Watson* more or less as his agents. His own evidence was of a vague and general description, and, if it had stood alone, would, I think, have imported the employment of those persons as his general agents in the matter. But, when I refer to the letters which passed at the time, as well as to the statements made by him in his answer to interrogatories, I have come to the conclusion that his employment of *Rich-*

ardson & Watson was only to prepare the conveyance to him, and that they were not general agents as was the case in *Brotherton v. Hatt. Richardson & Watson*, therefore, were not under any obligation from that mere agency to disclose the vendor's lien to *William Watson.*"

Note that this case was not put on the ground that Richardson & Watson undertook to defraud William Watson, but on the ground that the agency of Richardson & Watson was a limited agency only, and that they were not under any obligation from that mere agency to disclose the vendor's lien.

In *Cave vs. Cave*, 15 Ch. Div., 639, a solicitor used trust funds in purchasing property in the name of his brother. The property was then mortgaged to one Chaplin, who employed said solicitor to act for him in taking the mortgage. It was claimed that the knowledge of the solicitor was to be imputed to Chaplin, the mortgagee. The court, however, held that it was not. FRY, J., giving the opinion, said (p. 643):

"There is undoubtedly an exception to the construction or imputation of notice from the agent to the principal, that exception arising *in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy.* This exception has been put in two ways. In the very well-known case of *Rolland* v. *Hart*, Lord HATHERLEY put it substantially in this way, that you must look at the circumstances of the case, and inquire whether the Court can see that the solicitor intended a fraud, which would require the suppression of the knowledge of the incumbrance from the person upon whom he was committing the fraud. In *Thompson* v. *Cartwright*, the late Master of the Rolls put it rather differently, and it would appear that in his view you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated. In the one view notice is not imputed, because the circumstances are such as

not to raise the conclusion of law, which does ordinarily arise from the mere existence of notice to the agent; in the other view—that of Lord CHELMSFORD and Lord HATHERLEY—*the act done by the agent is such as cannot be said to be done by him in his character of agent*, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent.

"Those being the principles applicable to the decision of this case, I must ask myself what are the circumstances."

The court then proceeds to consider the particular facts in that case, and concludes that the notice was not imputed to Chaplin.

In re Marseilles Extension Railway Company, ex parte Credit Foncier and Mobilier of England, 7 Ch. App., 161. In this case Mr. Newbon, who was a director in both companies, and Mr. Heritage, who was a solicitor for both companies, went to the Credit Foncier for the purpose of negotiating a loan to the Marseilles Company, the purpose of the loan being to enable the Marseilles Company to buy, through a Mr. Bowles, its own stock in the market, with the view to keeping up the price of it, which was not permitted by the charter of the company, and both Mr. Newbon and Mr. Heritage had knowledge of this purpose. It was claimed that, inasmuch as Mr. Newbon and Mr. Heritage had knowledge of the purpose for which the money was to be used, and as they were director and solicitor of the Credit Foncier as well as of the Marseilles Company, therefore the Credit Foncier had imputed notice of the unlawful purpose to which the money was to be applied. The Court, however (Sir G. MELLISH, L. J.), said on this point (p. 168):

"I cannot think that because he [Newbon] was a common director to the two companies, we are on that

account to say that the one company has necessarily notice of everything that is within the knowledge of the common director, and which knowledge he has acquired as director of the other company."

In regard to the knowledge of Mr. Heritage, the common solicitor, the Court said (p. 169):

"He went with Mr. *Newbon* to negotiate the loan. That loan was only negotiated with Mr. *Grant*, the managing director of the *Credit Foncier*, and it was brought before the board of the *Credit Foncier*, and the board as a board came to the resolution to make the loan, not, as far as appears, consulting Mr. *Heritage*, or employing him at all as their solicitor in the matter, but acting as commercial men upon their own discretion. No doubt it may have been part of the terms that there should be a mortgage, and Mr. *Heritage* may have been employed as their solicitor to draw up the mortgage deed. But I cannot think that is sufficient to affect the *Credit Foncier* with notice of any improper mode in which this money was to be expended, even if Mr. *Heritage* had, which I cannot see that there is any evidence that he had, notice that it was to be expended for an improper purpose.

"After all, the real question is, which of two innocent sets of shareholders is to bear this loss? It appears to me that if the directors of the *Marseilles Company* have been guilty of an improper application of the funds of the *Marseilles Company*, it would be more just that the shareholders of the *Marseilles Company*, whose directors improperly applied this money, should bear the loss, than the innocent shareholders of the *Credit Foncier*, whose directors appear to have done what it was a perfectly legitimate thing for them to do; it being a part of their business to lend money, and the other company having power to borrow it."

Sir WILLIAM JAMES, L. J., in giving his opinion, says (p. 170):

"I am of the same opinion. I desire only to add this: I can not understand how a director of a company going to borrow money from another company can put the company from whom he borrows it in any different position from that in which a joint stock bank would be placed by a director of it asking a loan for

himself. Is it to be imputed to the banking company that they have knowledge of everything the director knows about his own private affairs? Such a proposition seems to be most unreasonable."

In *re European Bank, ex parte Oriental Commercial Bank*, 5 Ch. App., 358, Demetrio Pappa, as an individual, sold certain negotiable bills to the Eastern Commercial Bank, of which he was managing director. The money to pay for such bills belonged to another bank, to wit, the Oriental Commercial Bank, which fact Demetrio Pappa knew. It was claimed that this knowledge of Demetrio Pappa was to be imputed to the Eastern Commercial Bank, of which he was an agent as managing director. The Court (Sir G. M. GIFFARD, L. J.), giving the opinion, said (p. 361):

"Is then the *Eastern Commercial Bank* in any better position than *Demetrio Pappa* would have been? In my opinion they were not affected with notice through *Demetrio Pappa*. He purchased the bills before the *Eastern Commercial Bank* was formed. He stood in relation of vendor to that bank, and though he was managing director and something more, and paid himself by cheque, he is not in the position of a partner in an ordinary firm, but of agent acting for the bank as principal. He cannot be taken to have disclosed his own fraud: *Kennedy vs. Green* therefore applies."

In *Arden vs. Arden*, 29 Ch. Div., 702, it was claimed that notice to solicitors of trustees (of incumbrances upon equitable interests) was notice to the trustees for whom they were solicitors. The Court, however, held that the agency of these solicitors did not extend to receiving notices of the incumbrances, KAY, J., saying (p. 709):

"I do not think that Messrs. *Johnson*, although solicitors for the trustees, were their agents to receive notice of incumbrances."

The case of *Bradley vs. Riches*, 9 Ch. Div., 189, and the case of *Rolland vs. Hart*, 6 Ch. App., 681, are cases of solicitors employed by clients *expressly to look up the title to certain real estate.* It was, therefore, within the scope of their employment, and was their duty to examine the title, and if they discovered anything wrong with it to communicate that fact to their clients. It is on this express ground that those cases were decided. FRY, J., giving the opinion in *Bradley vs. Riches*, says (p. 196):

"In the next place he [Riches] was solicitor for *Woodman* in the matter of the mortgage of 1875, and he was bound by his duty as solicitor to communicate anything and everything that was material for *Woodman* to know."

So, also, Lord HATHERLEY, in the case of *Rolland vs. Hart*, *supra*, says (p. 681):

"It has been held over and over again that notice to a solicitor *of a transaction, and about a matter as to which it is part of his duty to inform himself*, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.

It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain."

Facts in the present case show that F. H. Prince & Company were not the agents of E. G. & E. Wallace to purchase these bonds.

Let us apply these settled principles to the present case:

Obviously E. G. & E. Wallace did not employ F. H. Prince & Company, or M. F. Dickinson, Jr., F. H. Prince & Company's attorney, to examine the Ordinances 314 and 315 to ascertain any facts with regard to these refunding bonds. That was not within the scope of the employment of F. H. Prince & Company by E. G. & E. Wallace. F. H. Prince & Company were bankers and brokers whom E. G. & E. Wallace had employed only to sell the Page Belting Company's stock. That was the scope and extent of their authority and of their duty. It was no part of their duty, as such agents, to examine into the validity of the Santa Cruz bonds, or any other bonds. Coffin & Stanton were trying to sell these Santa Cruz refunding bonds, and employed F. H. Prince & Company as their agents for this purpose. As such agents F. H. Prince & Company offered these bonds to E. G. & E. Wallace, accompanied by an opinion of the city attorney of the city of Santa Cruz approving the validity of the bonds, also an opinion of one Gleason, an attorney for Coffin & Stanton, approving the validity of these bonds. E. G. & E. Wallace then, acting for themselves and not through F. H. Prince & Company, or through any other agents, said to F. H. Prince & Company, who, with Coffin & Stanton, their principals, were on the vendor's side of the transaction: "No; we are not satisfied with the opinion of the city

attorney, or with the opinion of Gleason. We do not know them. You furnish an opinion of an attorney in Boston and we will consider the matter." Thereupon F. H. Prince & Company suggested getting the opinion of M. F. Dickinson, Jr., and E. G. & E. Wallace said his opinion would be satisfactory. F. H. Prince & Company, for themselves *and on their own account, and not as agents* of E. G. & E. Wallace, obtained the opinion of M. F. Dickinson, Jr. So found by the Court (Record, pp. 40, 41). These ordinances 314 and 315 were among the legal papers in the possession of the vendors, Coffin & Stanton, submitted by them to their agents, F. H. Prince & Company, and by F. H. Prince & Company to M. F. Dickinson, Jr., their attorney, all the time in the custody of the vendors and of their agents and of their attorneys. They never came into the possession or to the knowledge of E. G. & E. Wallace, the purchaser of these bonds, nor did they ever come into the possession or to the knowledge of any agent of E. G. & E. Wallace, the purchaser of these bonds, for E. G. & E. Wallace never had any agent in such purchase.

There was, therefore, no agency as respects E. G. & E. Wallace by virtue of which any constructive notice of these ordinances 314 and 315 could be imputed to E. G. & E. Wallace.

M. F. Dickinson, Jr., was not the attorney or agent of E. G. & E. Wallace, but was solely the attorney and agent of F. H. Prince & Company.

Not only is the fact found by the Court (Record, pp. 40, 41) that F. H. Prince & Company, on their own account and for themselves, and not acting as agents of E. G. & E. Wallace, employed said Dickinson to

give his opinion in relation to the validity of the bonds, and that said Dickinson, in the examination of said ordinances, and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as attorney of F. H. Prince & Company; but it is also true, as a matter of law, that, under such circumstances, the said M. F. Dickinson, Jr., was solely the attorney of F. H. Prince & Company, and did not sustain any contract relation whatever, or any relation of privity with E. G. & E. Wallace. The fact that F. H. Prince & Company employed M. F. Dickinson, Jr., to examine into the validity of the bonds and give his opinion, after they had had a conference with E. G. & E. Wallace as to whether his opinion would be satisfactory, does not change the relations of the parties.

A case precisely in point is *Savings Bank vs. Ward*, 100 U. S., 195. In that case the defendant Ward had been employed by some brokers to examine into the validity of the title to real estate. The Savings Bank agreed to make a loan upon the property. Further facts are stated in the opinion of the Court as follows (p. 197):

"Preliminaries being arranged, the brokers applied to the plaintiffs for the loan and obtained the same, giving the note and deed of trust with the certificate as security for the payment. *Before accepting the papers, the plaintiffs*, through their agent, required the brokers to sign the name of the borrower to the formal application for the loan, as exhibited in the transcript, and *that the certificate as to the title should be continued to the date of the transaction.*

Throughout, the negotiation for the loan was conducted entirely by the brokers with the plaintiffs, and it was the borrower who procured the second certificate from the defendant, the evidence showing that the defendant never came in contact either with the plaintiffs or the brokers."

It was afterwards found that the attorney, in examining the title, had overlooked a conveyance properly recorded. The Savings Bank brought an action at law against the attorney, alleging that they retained and employed him to examine the title, etc., and that he reported the title good, etc. This court held, however, that the attorney was *not* the attorney of the Savings Bank, and that there was no contract relation between them, and that the attorney was not liable in any way to the Savings Bank. The court made this holding (p. 197), notwithstanding the fact that

"Before accepting the papers, the plaintiffs [Savings Bank], through their agent, required * * * * * * * * * * * * * that the certificate as to the title should be continued to the date of the transaction."

See, also, to the same effect, *Dundee Mortgage Trust Investment Company vs. Hughes*, 10 Sawyer, 144, and cases there cited.

But even if F. H. Prince & Co. were to be deemed the agents of E. G. and E. Wallace in the matter of these bonds, and even if M. F. Dickinson, Jr., attorney for F. H. Prince & Co., were to be deemed connected with E. G. and E. Wallace, and even it were to be assumed that M. F. Dickinson, Jr., read ordinances Nos. 314 and 315, still there was no "bad faith" on the part of E. G. and E. Wallace, nor any negligence on their part, much less any "gross negligence" on their part, in not investigating in regard to the $89,000 of the water company bonds, which those ordinances expressly stated had "become part of the bonded indebtedness of the City of Santa

Cruz," in order to find facts in pais to contradict this express and positive statement by the City Council, the duly constituted representatives of the city.

We have shown in this brief (Point III., p. 125) that the $89,000 bonds of the water company, which the ordinances, Nos. 314 and 315, recite, "have become part of the bonded indebtedness of the city of Santa Cruz," might have become part of the bonded indebtedness of the city of Santa Cruz. It was not incumbent upon any one who proposed to purchase these refunding bonds, if he had read the said ordinances 314 and 315, and seen the statements therein contained, to go outside of the said ordinances and make an original investigation of matters *in pais*, or to investigate the proceedings of the city of Santa Cruz, to see whether or not, as a matter of fact, proper proceedings had been taken, etc., etc., to make the said $89,000 of bonds part of the bonded indebtednes of the city of Santa Cruz. Such proposed purchaser would not have been guilty of any bad faith, or of any gross negligence, or of any negligence whatever, if he had accepted the statement of the city council, to the effect that such bonds had become part of the bonded indebtedness of the city of Santa Cruz, and had failed to make a separate and independent investigation, in order to learn the truth or falsity of this statement of the city council, the duly constituted representative of the city.

Therefore, any holder of these refunding bonds would not be affected with constructive notice of any facts which he might have learned if he had made such independent inquiry and investigation.

A case in point is that of *Ware vs. Lord Egmont*, 4 DeG., M. & G., 460 (1854). In that case (p. 464):

"It was in evidence that the abstract of title furnished to Lord *Arden* showed on the face of it that *Nathaniel Polhill* had died an infant and unmarried in *April*, 1802. It further appeared that, upon the abstract of title delivered to Lord *Arden's* solicitors, the property sold was described to be property, the land tax of which had been redeemed. It was admitted that neither Lord *Arden* nor his advisers had any actual notice of the Plaintiff's claim, nor of the decree in *Ware vs. Polhill* (11 Ves., 257), nor of the fact of any payment of the rent-charge having ever been made by *Frederick Polhill*."

The Lord Chancellor (CRANWORTH), giving the opinion of the Court, said (p. 470):

"In this state of things, *Frederic* in 1835 sold the *Surrey* property for 19,000*l.* to Lord *Arden*. It was sold and conveyed as property the land tax of which was redeemed; and it is admitted neither Lord *Arden* nor his advisers had any actual notice of the claim of the infant's personal representatives, that they had no actual notice either of the decree or of the fact of payment of the rent charge. But the question is, whether, though there was no actual notice, there was not what is called constructive notice, notice of that which ought to have led Lord *Arden's* advisers to make further inquiries, under which the whole truth would have come out, and the omitting to make which amounted to culpable negligence. For if such constructive notice is established, no doubt the Defendants claiming under Lord *Arden* are bound by all the equities which affected *Frederic Polhill* the vendor, and he was certainly in no better position than that in which his brother *Thomas* had stood at the time of Lord *Eldon's* decree in 1805."

The Golden Rule as to Constructive Notice.

The Lord Chancellor then, after considering the facts of that particular case, and finding that there had not been any negligence on the part of Lord *Arden*, or of his solicitor, in not making further investigation of the facts of which they had notice on the abstract of title, lays down principles so just, so necessary and so important that we emphasize them. He says (p. 473):

"I must not part with this case without expressing my entire concurrence in what has on many occasions of late years fallen from Judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for Courts of Equity to extend the doctrine—to attempt to apply it to cases to which it has not hitherto been held applicable. Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question.

The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

The foregoing language of Lord CRANWORTH is quoted with approval by this court in *Wilson vs. Wall*, 6 Wall., 83, 91. See also the decisions of this court applicable to *negotiable instruments* quoted on this Brief (p. 92), in which this court holds that in order that any purchaser of negotiable instruments may be affected with notice of any defect in such instruments, not even negligence on his part is sufficient, but that he must be guilty of "*bad faith*." E. G. & E. Wallace were not guilty of either negligence or bad faith. It is found by the court that they paid full value and had no *actual* notice. To hold that they had *constructive* notice of any fact by reason of any agency of F. H. Prince & Co., as urged by counsel for the city of Santa Cruz would be to apply the doctrine of constructive notice to the working of the grossest injustice, and would be contrary to the well-settled principles and authorities above set forth.

For the foregoing reasons the judgment of the Circuit Court of Appeals in this case should be reversed, and the judgment

of the Circuit Court should be affirmed, with a modification which should permit the recovery of the plaintiff on the three coupons of the Northern Counties Investment Trust Company, Limited, mentioned in Finding of Fact No. 3 (Record, p. 18 and this brief, p. 141), as well as upon all the other bonds and coupons sued on.

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APPENDIX.

Constitution of California, Article XI., § 18, as to City Incurring Indebtedness.

"SEC. 18. No county, city, town, township, Board of Education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." [Amendment adopted November 8, 1892, consisted in making this read "*forty*" years, as here quoted, instead of "*twenty*" years, as theretofore.]

The Enabling Act of March 1, 1893, under which the bonds in suit were issued is reprinted ante pp. 3–5.

Municipal Improvement Bond Act of 1887.

"An Act authorizing the incurring of indebtedness by cities, towns, or municipal corporations, incorporated under the laws of this State.

"[Approved March 15, 1887.]

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. Any city, town, or municipal corporation, incorporated under the laws of this State, may, as hereinafter provided, incur indebtedness to pay the cost of any permanent municipal improvement requiring an expenditure greater than the amount allowed for such improvements by the ordinary annual tax levy.

"SEC. 2. Whenever the legislative branch of any city, town, or municipal corporation shall, by ordinance passed by a vote of three fourths of all its members and approved by the Executive of said city, town, or municipal corporation, determine therein that the public interest or necessity demands the acquisition, construction, or completion of any permanent municipal building, work, sewer, property, water rights, bridges, or improvement, the cost of which is too great to be paid for out of the ordinary annual income and revenue of the municipality, they may, after publication of such ordinance for at least two weeks in some newspaper published in such city, town, or municipal corporation, and at the next regular meeting after such publication, or at an adjourned meeting thereat, by ordinance, passed by a vote of three fourths of all its members, and also approved by the said Executive, call a special election, and submit to the qualified voters of said city, town, or municipal corporation the proposition of incurring a debt for the purpose set forth in the ordinance, and no question other than the incurring of indebtedness for said purpose shall be submitted. The ordinance of the city calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred; the estimated cost of such improvement; the necessity for such improvement; and that bonds of the city for municipal improvement

shall issue for the payment of the cost, as in said ordinance set forth, if the proposition be accepted by the qualified voters of the city, as hereinafter provided, and shall fix the day on which such special election shall be held, the manner of holding such election, and of voting for or against incurring the indebtedness; *provided*, such election shall be held as provided by law for holding elections in such city, town, or municipal corporation.

"SEC. 3. Said ordinance shall be published, once each day, for at least ten days, or once a week for two weeks, before the publication of the notice of the special election, in some newspaper published in such city, town, or municipal corporation. After said publication said legislative body shall cause to be published, for not less than two weeks, in at least one each of the newspapers of such city, a notice of such special election, the purposes for which the indebtedness is to be incurred, the amount of indebtedness to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of tax levy to be made for the payment thereof. It shall require a vote of two thirds of all voters, voting at such special election, to authorize the issuance of the bonds herein provided.

"SEC. 4. All bonds of municipality, for permanent improvements, issued under the provisions of this Act, shall be of a character of bonds known as serials, and shall be payable in the manner following: One twentieth part of the whole amount of indebtedness shall be payable each and every year, on a day to be fixed by the legislative branch of the city, together with the annual interest on all sums unpaid at such date; and the bonds shall be issued in such amount as the government of such city may determine, but not less than one hundred dollars each or more than one thousand dollars each, payable on the day fixed in said bond, with interest not to exceed the sum of five per cent. per annum. Such bonds may be sold by the said legislative branch of such city, town, or municipal corporation as they may determine, at not less than their face value in gold coin of the United States; and the proceeds of such sale shall be placed in the treasury of such city, town, or municipal corporation, to the credit of the "Municipal Improvement Fund", "No.——," or other designation, and shall be applied exclusively to the purposes and

objects mentioned in the ordinance providing for the issuance of such bonds, until said objects are accomplished; and the residue, if any, shall be transferred to the General Fund of said city, town, or municipal corporation.

SEC. 5. The legislative branch of such city shall, at the time of fixing the general tax levy of said city, and in the manner for such general tax levy provided, levy and collect annually each year for the term of twenty years, a tax sufficient to pay the annual interest on said bonds, and also one twentieth part of the aggregate amount of such indebtedness so incurred. The taxes herein required to be levied and collected shall be in addition to all other taxes levied for city purposes, and shall be collected at the same time and in the same manner as other city taxes are collected.

SEC. 6. Within thirty days after the sale of such bonds, the Executive of said city, town, or municipal corporation shall appoint a Commissioner of such improvement, who shall be confirmed by a vote of not less than three fourths of the members of the legislative branch of said municipal government, and the Commissioner shall have charge of the said improvement and the disbursement of the said funds for such purposes, subject to the conditions of the ordinances of the said city providing for such work or improvement, and such ordinances as may at any time be passed relating thereto; but the Commissioner, when appointed, shall not be removed until the completion of the said improvement, unless by order of the Executive, concurred in by a vote of three fourths of said legislative branch.

SEC. 7. The compensation of the Commissioner to be appointed under the provisions of this Act shall be fixed by ordinance not to exceed five dollars per day for each day of actual service; said Commissioner shall execute an official bond, in the penal sum of ten thousand dollars ($10,000), for the faithful performance of his duties.

SEC. 8. All contracts for the construction or completion of any work, or of improvements, or furnishing of materials for work or improvements, as herein provided for, shall be let to the lowest responsible bidder, who shall furnish such bonds as the legislative branch of said city, town, or municipal corporation may require.

SEC. 9. Whenever the legislative branch of such city, town, or municipal corporation shall, by resolution, deem it necessary, the Treasurer of such city shall, within ten days after the passage of such resolution, give additional bonds, provided for the proper care and custody of any municipal improvement fund, as in this Act provided.

SEC. 10. All general and special Acts and parts of such Acts in conflict with this Act, or abridging the rights of cities, towns, or municipal corporations herein, are hereby repealed.

SEC. 11. This Act shall take effect and be in force from and after its passage."

Session Laws of California, 1887, p. 120.

Municipal Improvement Bond Act of 1889, as Amended.

"An Act authorizing the incurring of indebtedness by cities, towns and municipal corporations, incorporated under the laws of this State, for the construction of waterworks, sewers and all necessary public improvements, or for any purpose whatever, and to repeal the Act approved March 9th, 1885, entitled 'An Act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks;' also, to repeal an Act approved March 15th, 1887, entitled 'An Act authorizing the incurring of indebtedness by cities, towns and municipal corporations incorporated under the laws of this State.' [Approved March 19th, 1889, Stat. 1889, p. 399.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Any city, town or municipal corporation incorporated under the laws of this State may, as hereinafter provided, incur indebtedness to pay the

cost of any municipal improvement or for any purpose whatever requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy.

SECTION 2. Whenever the legislative branch of any city, town or municipal corporation shall, by ordinance passed by a vote of two-thirds of all its members, and approved by the executive of said city, town or municipal corporation, determine that the public interests or necessity demands the acquisition, construction or completion of any municipal buildings, bridges, waterworks, water rights, sewers, or other municipal improvements, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, they may, after the publication of such ordinance for at least two weeks in some newspaper published in such municipality, and at their next regular meeting after such publication, or at an adjourned meeting, by ordinance passed by a vote of two-thirds of all its members, and also approved by the said executive, call a special election and submit to the qualified voters of said City, Town, or municipal corporation, the proposition for the purpose set forth in the ordinance, and no question other than the incurring of indebtedness for said purpose shall be submitted. The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvement, the necessity for such improvement, and that the bonds of the municipality shall issue for the payment of the cost of such improvement, as in such ordinance set forth, if the proposition be accepted by the qualified voters, as hereinafter provided, and shall fix the day on which such special election shall be held, the manner of holding such election, and the voting for or against incurring such indebtedness ; such election shall be held as provided by law for holding such election in such city, town, or municipal corporation ; provided, however, that where by the terms or provisions of the charter of any city, town, or municipal corporation, the cost of making the proposed improvements is to be or must be paid from a special fund created by such charter for that purpose, the proposition of incurring such an indebtedness may be submitted to the qualified voters at any general election for officers of the State of Cali-

fornia, or of such city, town, or municipal corporation. (As Amended Stat. 1891, p. 84.)

SECTION 3. Such ordinance shall be published once a day, for at least ten days, or once a week for two weeks before the publication of the notice of the special election, in some newspaper published in such municipality. After said publication, said legislative body shall cause to be published for not less than two weeks, in at least one of the newspapers published in such municipality, a notice of such special election, the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of tax levy to be made for the payment thereof. It shall require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds herein provided.

SECTION 4. It shall be the duty of the legislative branch of any municipality contemplating permanent public improvements, to first have plans and estimates of the cost of such improvements made by a competent engineer or architect, who has had successful experience in such work, before the question of incurring an indebtedness for such improvement is submitted to vote.

SECTION 5. No city, town, or municipal corporation shall incur an indebtedness for public improvements which shall, in the aggregate, exceed fifteen per cent of the assessed value of all the taxable real estate and personal property of such city, town, or municipal corporation. (As Amended Stat. 1891, p. 84.)

SECTION 6. All municipal bonds for public improvements issued under the provisions of this Act shall be of the character of bonds known as serials, and shall be payable in gold coin or lawful money of the United States, in the manner following: One-fortieth part of the whole amount of indebtedness shall be paid each and every year, on a day and at a place to be fixed by the legislative branch of the municipality issuing the bonds, together with the interest on all sums unpaid at such date. The bonds shall be issued in such denominations as the legislative branch of the municipality may determine, except that no bonds shall be of a less denomination than one hundred dollars, nor of a greater denomination than one thousand dollars each, payable on the day and at the place fixed in such bond, and with interest at the rate specified in the bond,

which rate shall not be in excess of the legal rate of the State of California, and may be payable annually or semi-annually. Such bonds may be issued and sold by the legislative branch of the city, town, or municipal corporation, as they may determine, at not less than their face value, in gold coin of the United States, and the proceeds of such sale shall be placed in the municipal treasury to the credit of the proper improvement fund, and shall be applied exclusively to the purposes and objects mentioned in the ordinance, until such objects are fully accomplished, after which if any surplus remains, such surplus shall be transferred to the General Fund of such municipality. (As Amended Stat. 1893 p. 61.)

SECTION 7. The legislative branch of any city, town, or municipal corporation, issuing bonds under authority of this Act, shall have the right to determine the rate of interest such bonds shall bear ; provided that in no case shall it exceed seven per cent. per annum, and to name the date and place where such bonds and interests shall be paid ; provided that the place of payment shall be either at the office of the Treasurer of the municipality, or at some designated bank in San Francisco, Chicago, New York or Boston. The said bonds shall be signed by the Executive of the Municipality, and also by the Treasurer thereof, and shall be countersigned by the Clerk. The coupons of said bonds shall be numbered consecutively and signed by the Treasurer.

SECTION 8. The legislative branch of said city, town, or municipal corporation shall, at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect annually, each year, for the term of forty years, a tax sufficient to pay the annual interest on such bonds, and also one-fortieth part of the aggregate amount of such indebtedness so incurred. The taxes herein required to be levied and collected shall be in addition to all other taxes levied for municipal purposes and shall be collected at the same time and in the same manner as other municipal taxes are collected. (As amended Stat 1893 p. 61.)

SECTION 9. It shall be the duty of the legislative branch of every city, town, or municipal corporation, wherein public improvements are being made under the provision of this Act, to make all needful rules and regulations for carrying out and maintaining such improve-

ments; to appoint all needful agents, superintendents, and engineers to properly look after the construction and operation of such public works, and in all lawful ways to protect and preserve the rights and interests of the municipality; provided, however, that in cities, towns, or municipalities operating under a charter heretofore or hereafter framed under Section eight of Article eleven of the Constitution, and having a Board of Public Works, all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the Board of Public Works of such city, town, or municipality. (As Amended Stat. 1891 p. 132.)

SECTION 10. All contracts for the construction or completion of any public works or improvements, or for furnishing labor or materials therefor, as herein provided, shall be let to the lowest responsible bidder. The legislative branch of the municipality shall advertise, for at least ten days, in one or more newspapers published in the municipality, inviting sealed proposals for furnishing the labor and materials for the proposed improvements, before any contract shall be made therefor. The said legislative branch shall have the right to require such bonds as they may deem best from the successful bidder, to insure the faithful performance of the contract work. They shall also have the right to reject any or all bids; provided, however, that in cities, towns or municipalities operating under a charter heretofore or hereafter framed under Section Eight of Article Eleven of the Constitution, and having a Board of Public Works, all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the Board of Public Works of such city, town, or mucipality. (As Amended Stat. 1891. p. 132.)

SECTION 11. Whenever the legislative branch of any municipality shall by resolution deem it necessary they may require the Treasurer of such municipality to give additional bonds for the safe custody and care of the public funds.

SECTION 12. The Act approved March 9th, eighteen hundred and eighty-five, entitled "An Act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain public water works," and

the Act approved March 15th, eighteen hundred and eighty-seven, entitled "An Act Authorizing the Incurring of Indebtedness by Cities, Towns and Municipal Corporations, Incorporated Under the Laws of this State," and all general Acts, or special Acts, or parts of Acts, conflicting with this Act, are hereby repealed.

SECTION 13. This Act shall take effect and be in force from and after its passage."

Session Laws of California, 1889, p. 399.
Session Laws of California, 1891, pp. 84, 132.
Session Laws of California, 1893, p. 61.